

# MILITARY LAW REVIEW

## ARTICLES

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HIS MEMBERS THREE — SELECTION OF MILITARY JURIES BY THE  
SOVEREIGN: IMPEDIMENT TO MILITARY JUSTICE

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# MILITARY LAW REVIEW

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## **MILITARY LAW REVIEW — VOLUME 157**

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# MILITARY LAW REVIEW

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## HE CALLED FOR HIS PIPE, AND HE CALLED FOR HIS BOWL, AND HE CALLED FOR HIS MEMBERS THREE—SELECTION OF MILITARY JURIES BY THE SOVEREIGN: IMPEDIMENT TO MILITARY JUSTICE

MAJOR GUY P. GLAZIER'

Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group are undermining processes weakening the institution of jury trial, and should be sturdily resisted.

—Justice Frank Murphy<sup>2</sup>

[L]et it be again remembered, that delays and little inconveniences in the forms of justice are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the

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1. . Judge Advocate, United States Marine Corps. Presently assigned to the Operations Division, Marine Corps Base, Quantico, Virginia. B.S., 1986, University of California, Berkeley; J.D., *magna cum laude*, 1992, Georgetown University Law Center. Formerly assigned to the 46th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia, 1997-98; defense counsel, 1996-97, and trial counsel, 1993-96, Legal Services Support Section, First Force Service Support Group, Camp Pendleton, California; officer-in-charge, Legal Team Kinser, Legal Services Support Section, Third Force Service Support Group, Okinawa, Japan, 1992-93; Aide-de-camp, Sixth Marine Expeditionary Brigade, Camp Lejeune, North Carolina, 1988-89; Company Executive Officer and Platoon Commander, Eighth Engineer Support Battalion, Second Force Service Support Group, Camp Lejeune, North Carolina, 1986-88. The article is a thesis that was submitted in partial completion of the Master of Laws requirements of the 46th Judge Advocate Officer Graduate Course.

2. United States v. Glasser, 315 U.S. 60, 86 (1942).

utter disuse of juries in questions of the most momentous concern.

—Justice Sir William Blackstone<sup>3</sup>

## I. Introduction

A district attorney is vested with prosecutorial discretion. What if he picked the jury from among those who work directly for him? The governor wields the power of clemency. What if she picked the jury? The grand jury, guided by the prosecutor and cloaked in secrecy, formally investigates criminal allegations. What if they chose the membership of each petit jury? The military commanding officer is apprised of suspected misconduct within his unit. He stays informed and may properly influence the course of ongoing criminal investigations. He decides whether, who, and on what charges to prosecute. Ultimately, he determines the propriety of all convictions and sentences. He is the district attorney, the governor, and the grand jury rolled into one. In the exercise of justice, he is as close to a true sovereign as this nation has, and he picks the jury from among those who work for him.

The Uniform Code of Military Justice<sup>4</sup> (UCMJ) governs trials of criminally accused service members. Under this statute and its implementing rules, the commanding officer of the accused “convenes” a court-martial<sup>5</sup> and “refers” charges to it for trial.<sup>6</sup> The process of convening a court-

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3. 4 WILLIAM BLACKSTONE, COMMENTARIES \*350.

4. See 10 U.S.C. §§ 801-946 (1994).

5. See UCMJ arts. 22-24 (1995); MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 504 (1995) (implementing these articles) [hereinafter MCM]. Service regulations of the different branches of the military augment the UCMJ provisions and establish what level of commanding officer shall be designated as a convening authority and for what level of court-martial. For example, in the Army, brigade level commanding officers (generally colonels) are typically designated as special court-martial convening authorities. In the Navy, ships' commanding officers (generally captains or commanders) are so designated. In the Marine Corps, battalion level commanders (lieutenant colonels) are special court-martial convening authorities. In the Air Force, group commanders (colonels) hold the position. In all services, flag officers in command are generally appointed as general court-martial convening authorities. For general procedures and examples, see U.S. DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE, para. 5-2 (24 June 1996); U.S. DEP'T OF NAVY, JUDGE ADVOCATE GENERAL INSTR. 5800.7C, MANUAL OF THE JUDGE ADVOCATE GENERAL, § 0120 (3 Oct. 1990)(C2, 23 Feb. 1995). The term “commanding officer” is used in this article interchangeably with special or general court-martial convening authority.

martial includes selecting its jury (or members) according to the specifically listed criteria of Article 25.<sup>7</sup> The convening authority must select members who, "in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament."\* There are no statutory or regulatory methods for actually accom-

6. See UCMJ arts. 30, 32-35; MCM, *supra* note 5, R.C.M. 601 (implementing these articles).'

7. The first three subsections of Article 25 discuss the general eligibility of commissioned officers, warrant officers, and enlisted personnel to serve as court-martial members. See UCMJ art. 25(a)-(c). Article 25(d) sets forth the specific criteria for member selection, discussed presently. The final subsection governs the convening authority's delegable power to excuse members who were previously detailed. See *id.* art. 25(e).

8. *Id.* art. 25(d)(2). That provision continues: "No member of an armed force is eligible to serve as a member of a general or special court-martial when he is the accuser or a witness for the prosecution or has acted as investigating officer or as counsel in the same case." *Id.* Subsection (d)(1) states: "[w]hen it can be avoided, no member of an armed force may be tried by a court-martial any member of which is junior to him in rank or grade." *Id.* art. 25(d)(1). See MCM, *supra* note 5, R.C.M. 501-505 (implementing Article 25).

The 1920 revisions to the Articles of War first incorporated specific member selection criteria as follows:

When appointing courts-martial, the appointing authority shall detail as members thereof those officers of the command who, in his opinion, are best qualified for the duty by reason of age, training, experience, and judicial temperament; and officers having less than two years service shall not, if it can be avoided without manifest injury to the service, be appointed as members of courts-martial in excess of the minority membership thereof.

Articles of War of 1920, art. 4, reprinted in *MANUAL FOR COURTS-MARTIAL, UNITED STATES*, app. 1, at 494 (1921) [hereinafter 1921 *MANUAL*]. The tradition of staff assistance in this duty began with the 1921 *Manual for Courts-Martial*. Paragraph 6 charged the staff judge advocate with advising the convening authority on the qualifications of potential members pursuant to Article 4. See 1921 *MANUAL*, *supra*, ¶ 6(c) n.2. Article 16 of the Articles of War disallowed trial of officers by a panel including any officers junior to the accused. See Articles of War of 1920, art. 16, reprinted in 1921 *MANUAL*, *supra*, app. 1, at 498. In 1950, the drafters of the UCMJ fashioned Article 25 from Articles 4 and 16 of the Articles of War. See UCMJ art. 25 (1958) (as amended in 1968, 1983, and 1986). They added "education" to the previously enunciated qualifications of age, training, experience, and judicial temperament. They substituted "length of service" as another subjective qualification in place of the previous requirement for two years of active service. See *id.* art. 25(d)(2). The drafters suggested panels of members who are senior to the accused in all cases. See *id.* art. 25(d)(1).

plishing the selection. Scholars have identified preferred methods,<sup>9</sup> but the actual practice varies widely among and within the services.<sup>10</sup>

There are two basic problems with this process, one largely theoretical, the other very practical. First, it is unconstitutional. The Supreme Court has interpreted the Constitution's provisions governing trial by jury to include fundamental standards for jury selection. Specifically, the Court mandates impartial selection of jurors from a fair cross-section of the community.<sup>11</sup> The law entitles the accused service member to a panel of members;<sup>12</sup> however, the selection process used to impanel this military jury is entirely at odds with the constitutional standards. The usurpation of this fundamental individual right also violates the concept of separation of powers, which is central to the structure of the government.<sup>13</sup> Second, it is unfair, both in reality and in appearance. The process naturally breeds unlawful command influence and its mien. At best, military jury selection incorporates the varied individual biases of numerous convening authorities and their subordinates. At worst, it involves their affirmative misconduct. "Court-stacking" is consistently achieved, suspected, or both.<sup>14</sup> Further, the convening authority exerts improper dominion and control over the independence of military jurors.<sup>15</sup>

The failure to recognize and to address these two problems is a consequence of a third, more complex and over-arching problem of perception. Article 25 reflects the theory that "military justice" means "military discipline." Article 25 survives, despite its prima facie unconstitutionality, through the judicially created "separate society" concept of the military.<sup>16</sup> Discipline is crucial to the military's proper functioning. Therefore, runs this concept, the military is unencumbered by constitutional standards of justice that are thought to impede discipline. Unlawful command influence, where manifestly encountered, is usually remedied case-by-case. However, courts and commentators often view command control of disci-

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9. See Major Lawrence J. Morris, *Keystones of the Military Justice System: A Primer for Chiefs of Justice*, ARMY LAW., Oct. 1994, at 15.

10. See *infra* Part III.

11. See *infra* notes 29 and 39 and accompanying text.

12. In fact, in the military, trial by members is the default setting. The accused may request trial by military judge alone. See MCM, *supra* note 5, R.C.M. 903. Absent a "substantial reason why, in the interest of justice," the *Manual for Courts-Martial* counsels the judge to grant such requests. *Id.* R.C.M. 903(B) discussion.

13. See discussion *infra* Part II.C.

14. See discussion *infra* Part III.A.

15. See discussion *infra* Part III.B.

16. See *infra* notes 327-330 and accompanying text.

pline as integral to command control of the mechanisms of justice.<sup>17</sup> They fail to recognize that justice complements discipline rather than diminishing it. The statistically occasional unlawful control has become a condemnable but tolerable side effect of the institutional need for discipline.

The proposed National Defense Authorization Act for Fiscal Year 1999,<sup>18</sup> passed by the House of Representatives and placed in the Senate, directs the Secretary of Defense to report to Congress on court-martial panel selection by 15 April 1999.<sup>19</sup> The bill specifically tasks the Secretary of Defense to develop, with the secretaries of the military departments, a plan for random selection of court-martial members.<sup>20</sup>

This article explores the theoretical and practical shortcomings of the current member selection procedures under the UCMJ and proposes a comprehensive solution. First, the article examines the history and development of the constitutional right to trial by a jury impartially selected from a fair cross-section of society. The article exposes the weaknesses underlying the judicially created and sustained exception to this right for military trials. As constitutional principles of jury selection and the practice of military law each evolve, their incongruity becomes ever more apparent. Second, the article develops the rich and diverse history of unlawful command influence in the selection of, and interaction with, court-martial members. The continued vibrancy of unlawful command influence in this area tracks the consistent failure of the appellate judiciary to curtail it. Third, this article develops a model for a new system of court-martial jury selection, administered and maintained by computer database. Finally, the article defends the model, focusing on its theoretical and practical advantages over Article 25 and advocating a new approach to the interplay of justice and discipline.

## 11. The Theoretical Problem with Military Jury Selection: Conflict Between Article 25 and the Constitution

Five years after Congress enacted the UCMJ, the United States Supreme Court voiced foreboding lack of confidence in the statute's ability to guarantee constitutional standards. The Court stated: "[M]ilitary tribu-

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17. See discussion *infra* Part IV.B.3.

18. H.R. 3616, 105th Cong. (1998).

19. See *id.* § 561(a).

20. See *id.* § 561(b).

nals have not been and probably never can be constituted in such a way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts."<sup>21</sup> The statement delicately and unwittingly identified a fundamental problem with military jury selection, which is, in substance, unchanged today.<sup>22</sup> Put bluntly, the practice is unconstitutional.

#### A. The Constitutional Right to Trial by Jury: History, Tradition, and Evolution

The right to trial by jury enjoys a rich history from antiquity through the present day.<sup>23</sup> The United States Constitution reflects in text and context the importance of the right at this nation's birth. The Constitution twice guarantees the right to trial by jury to the criminally accused. Article III provides:

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.<sup>24</sup>

The Sixth Amendment adds:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory pro-

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21. U.S. *ex rel.* Toth v. Quarles, 350 U.S. 11, 17 (1955) (holding that former members of the armed services may not be tried by court-martial, as they, like all other civilians, are entitled to all of the procedural and substantive rights and safeguards provided in federal district court).

22. The 1986, 1983, and 1968 amendments to Article 25 affected subsections (c) and (e), primarily in ministerial fashion. See Military Justice Amendments of 1986, Pub. L. No. 99-661, § 825(c)(1), 100 Stat. 3816, 3906; Military Justice Act of 1983, Pub. L. No. 98-209, § 825(e), 97 Stat. 1393, 1394; Military Justice Act of 1968, Pub. L. No. 90-632, § 825(c)(1), 82 Stat. 1335, 1336.

23. See *infra* notes 132, 144.

24. U.S. CONST. art. III, § 2, cl. 3.

cess for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.<sup>25</sup>

The Supreme Court has added specific meaning to these broad edicts. In 1930, the accused's express and intelligent waiver of his right to trial by jury was ineffective by itself. The Court also demanded the approval of the judge and the prosecutor before sanctioning a bench trial.<sup>26</sup> In the 1940s, the Court impressed some lasting requirements on the right to trial by jury. The Court declared trial by jury "a prized shield against oppression."<sup>27</sup> A unanimous Court found that "[i]t is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community."<sup>28</sup> Further, said the Court, "[t]he American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community . . . without systematic and intentional exclusion of any [group]."<sup>29</sup>

The late 1960s and 1970s saw the most important interpretation to date. In the seminal case of *Duncan v. Louisiana*,<sup>30</sup> the Court found the right to trial by jury to be "fundamental to the American scheme of justice" and binding on the states through the Fourteenth Amendment.<sup>31</sup> "[T]he truth of every accusation . . . should afterward be confirmed by the . . . suffrage of twelve of his equals and neighbors, indifferently chosen and supe-

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25. *Id.* amend. VI. The Constitution also guarantees the right to trial by jury in civil cases. "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . ." *Id.* amend. VII.

26. *See* *Patton v. United States*, 281 U.S. 276, 312 (1930). Five years later, the Court espoused a strong commitment to the principles of the constitutional jury trial provisions.

[T]rial by jury has always been, and still is generally regarded as the normal and preferable mode of disposing of issues of fact in civil cases at law as well as in criminal cases. Maintenance of the jury as a fact-finding body is of such importance and occupies so ~~firm~~ a place in our history and jurisprudence that *any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.*

*Dimick v. Schiedt*, 293 U.S. 474 (1935) (emphasis added).

27. *Glasser v. United States*, 315 U.S. 60, 84 (1941).

28. *Smith v. Texas*, 311 U.S. 128, 130 (1940) (striking down a state statutory scheme that, in practice, operated to racially discriminate in the selection of grand jurors).

29. *Thiel v. Southern Pac.*, 328 U.S. 217 (1946).

30. 391 U.S. 145 (1968).

31. *Id.* at 149.

rior to all suspicion.”<sup>32</sup> The Court subsequently retreated from this encompassing language. In *Baldwin v. New York*,<sup>33</sup> the Court held that potential punishment short of six months’ incarceration fails to trigger the right under the federal Constitution.<sup>34</sup> In *Williams v. Florida*,<sup>35</sup> the Court found no constitutional violation for state juries numbering six.<sup>36</sup> In *Johnson v. Louisiana*,<sup>37</sup> the Court upheld the constitutionality of a state jury’s conviction that was reached by a two-thirds majority vote.<sup>38</sup> However, the Court remained committed to its principles concerning the scope and importance of the right. The Court held that “*the fair cross-section requirement [is] fundamental to the jury trial guaranteed by the Sixth Amendment . . . .* Community participation in the administration of the criminal law . . . is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system.”<sup>39</sup>

The language of the basic tenets of criminal law set out in Article III and the Sixth Amendment to the Constitution is broad and clear. The Supreme Court’s interpretation is sweeping. However, neither the legislature nor the judiciary has ever considered any of it to be applicable to *military* criminal law. This exception is an old judicial creation. Scrutiny of its supposed foundations reveals little justification, and analysis of the con-

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32. 4 BLACKSTONE, *supra* note 3, at \*349-50, *quoted in Duncan*, 391 U.S. at 151-52. The *Duncan* Court stated that “the jury trial provisions in the Federal and State constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges.” *Duncan*, 391 U.S. at 155-56.

33. 399 U.S. 66 (1970) (plurality opinion).

34. The Court presented a balanced argument.

[T]he prospect of imprisonment for however short a time will seldom be viewed by the accused as a trivial or “petty” matter and may well result in quite serious repercussions affecting his career and his reputation. Where the accused cannot possibly face more than six months’ imprisonment, we have held that these disadvantages, onerous though they may be, may be outweighed by the benefits that result from speedy and inexpensive nonjury adjudications. We cannot, however, conclude that these administrative conveniences, in light of the practices that now exist in every one of the 50 States as well as in the federal courts, can similarly justify denying an accused the important right to trial by jury where the possible penalty exceeds six months’ imprisonment.

*Id.* at 73-74.

35. 399 U.S. 78 (1970).



text in which this exception was created reveals no basis for continued application.

### B. *Ex parte Milligan* and *Ex parte Quirin*: Denial of the Constitutional Right to Trial by Jury in the Military

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36. *Id.* at 86-90. The Court offered an interesting background.

[T]he oft-told history of the development of trial by jury in criminal cases. . . revealed a long tradition attaching great importance to the concept of relying on a body of one's peers to determine guilt or innocence as a safeguard against arbitrary law enforcement. That same history, however, affords little insight into the considerations that gradually led the size of that body to be generally fixed at 12. Some have suggested that the number 12 was fixed upon simply because that was the number of the presentment jury from the hundred, from which the petit jury developed. Other, less circular but more fanciful reasons for the number 12 have been given . . . and rest on little more than mystical or superstitious insights into the significance of "12." Lord Coke's explanation that the "number of twelve is much respected in holy writ, as 12 apostles, 12 stones, 12 tribes, etc.," is typical. In short, while sometime in the 14th century the size of the jury at common law came to be fixed generally at 12, that particular feature of the jury system appears to have been a historical accident, unrelated to the great purposes which gave rise to the jury in the first place.

*Id.* (citations omitted).

37. 406 U.S. 356 (1972).

38. *Id.* at 360. "[T]hree dissenting votes to acquit raises no question of constitutional substance about either the integrity or the accuracy of the majority verdict of guilt." *Id.* "That rational men disagree is not in itself equivalent to a failure of proof by the State, nor does it indicate infidelity to the reasonable-doubt standard." *Id.* at 361.

39. *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (emphasis added) (striking down, under fair cross-section requirements of the Sixth and Fourteenth Amendments, a state constitutional and statutory jury service exemption for women). In fact, the Supreme Court justified its decisions that allowed states to provide for convictions by juries of less than 12 and on less than unanimous vote with the fair cross-section requirement. In *Williams*, the Court stated that the number of persons on the jury should "be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross-section of the community." *Williams*, 399 U.S. at 100. See *Apodaca v. Oregon*, 406 U.S. 404, 410-11 (1972) (plurality opinion) ("[A] jury will come to . . . a [commonsense] judgment as long as it consists of a group of laymen representative of a cross section of the community who have the duty and the opportunity to deliberate . . . on the question of . . . guilt.").

One hundred thirty-two years ago, the Supreme Court decided *Ex parte Milligan*.<sup>40</sup> During the Civil War, Lamdin Milligan was a civilian citizen of the United States and the State of Indiana. Apparently, he neither belonged to nor associated with the armed services of the Union or the Confederacy.<sup>41</sup> Milligan was arrested at his home in October 1864 under the orders of the commandant of the Military District of Indiana.<sup>42</sup> The Union government accused him of violating domestic law and the law of war. The government alleged that he communicated with the enemy, resisted the draft, and conspired to seize munitions and to release prisoners of war.<sup>43</sup> The same commandant who ordered the arrest convened a military commission, which tried and convicted Milligan.<sup>44</sup>

The Supreme Court determined that a military commission may not, even during civil war, try a civilian citizen when state and federal courts are open and operating.<sup>45</sup> The civilian citizen in such circumstances enjoys his full panoply of constitutional rights.<sup>46</sup> According to the Court, these include one of the most important freedoms that Mr. Milligan was denied, his right to be tried by a jury.<sup>47</sup>

The theme of *Milligan* is the maintenance of civil liberty even during national strife. For pages of eloquent text, the Court paid tribute to the virtues of constitutionally secured rights against oppression, tyranny, and the dangers of martial control.

The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.<sup>48</sup>

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40. 71 U.S. (4 Wall.) 2 (1866).

41. See *id.* at 6.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 107, 127.

46. See *id.* at 118-24.

47. *Id.* at 122.

Then, on one page in the middle of the opinion, in the middle of extolling the paramount nature of the right to trial by jury, the Court withheld the right from those in military service.

[I]f ideas can be expressed in words, and language has any meaning, this right—one of the most valuable in a free country—is preserved to everyone accused of crime who is not attached to the army, or navy, or militia in actual service.<sup>49</sup>

The Court explained that the language of the Sixth Amendment is “broad enough to embrace all persons and cases”<sup>50</sup> but acknowledged the specific exception in the Fifth Amendment to the requirement for grand jury presentment and indictment in military cases.<sup>51</sup> The Court then concluded that “the Framers of the Constitution, *doubtless*, meant to limit the right of trial by jury, in the sixth amendment, to those persons who were subject to indictment or presentment in the fifth.”<sup>52</sup> The Court provided no reference or support for this conclusion.<sup>53</sup> Following this brief foray into constitutional analysis that was marginally related to the facts of the case, the Court returned to its worship of basic constitutional rights. “*All other*

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48. *Id.* at 121. The Court further stated: “[n]o graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole people; for it is the birthright of every American citizen when charged with crime, to be tried and punished according to law.” *Id.* at 118-19.

The crimes with which Milligan was charged were of the gravest character, and the petition and exhibits in the record . . . admit his guilt. But whatever his desert of punishment may be, it is more important to the country and every citizen that he should not be punished under an illegal sentence, sanctioned by this court of last resort, than that he should be punished at all. The laws which protect the liberties of the whole people must not be violated or set aside in order to inflict, even upon the guilty, unauthorized though merited justice.

*Id.* at 132 (Chase, C.J., concurring).

49. *Id.* at 123 (emphasis added).

50. *Id.*

51. See *id.* “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . .” U.S. CONST. amend. V.

52. *Milligan*, 71 U.S. (4 Wall.) at 123 (emphasis added).

53. See *id.*

persons, citizens of states where the courts are open, if charged with crime, are guaranteed the inestimable privilege of trial by jury.”<sup>54</sup>

Almost eighty years after *Milligan*, the Supreme Court decided *Ex parte Quirin*.<sup>55</sup> During World War II, Richard Quirin was a citizen of the German Reich and a member of its armed forces.<sup>56</sup> In mid-June 1942, following the declaration of war between the United States and Germany, he infiltrated the sovereign territory of the United States. He was equipped and ordered to destroy industries and activities that furthered the United States war effort.<sup>57</sup> The United States Supreme Court held that a military commission *could* try captured German spies in accordance with the law of war.<sup>58</sup> The Court found no Sixth Amendment right, under these circumstances, to trial by jury in the civil courts.<sup>59</sup> Again venturing beyond the facts before it, the Court justified its conclusion in overly broad dicta. “The fact that ‘cases arising in the land or naval forces’ are excepted from the operation of the Amendments does not militate against this conclusion. Such cases are expressly excepted from the Fifth Amendment, and are deemed excepted by implication from the Sixth.”<sup>60</sup>

Since the *Quirin* decision, a tired and thoughtless mantra has developed in military Sixth Amendment jurisprudence. “The . . . right to a trial by jury . . . has long been recognized as inapplicable to trials by court-martial.”<sup>61</sup> This verbiage or similar language, which is always hinged on the apparently seminal cases of *Quirin* and *Milligan*, appears repeatedly throughout pertinent case law.<sup>62</sup> Whenever an issue concerning jury selection arises, the message is generally simple and devoid of analysis, appli-

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54. *Id.*

55. 317 U.S. 1 (1942).

56. *Id.* at 21.

57. *See id.* Richard Quirin had lived in the United States, but was born in Germany and returned to Germany between 1933 and 1941. Quirin and his countrymen came ashore on Long Island, New York bearing explosives, incendiaries, fuses, and timing devices. They landed under the cover of darkness from the submarine that brought them across the Atlantic. They wore German Marine Infantry uniforms during their landing and buried these with their supplies once ashore. They proceeded to New York City in civilian attire. All were trained in Germany for espionage and sabotage. The German government paid them during this training and promised further compensation for their acts of destruction within the United States. *Id.*

58. *Id.* at 48.

59. *Id.* at 29, 39-41.

60. *Id.* at 40 (citing *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 6 (1866)).

61. *United States v. Loving*, 41 M.J. 213, 285 (1994) (citing *Quirin*, 317 U.S. at 39-41; *Milligan*, 71 U.S. (4 Wall.) at 137-380), *aff'd on other grounds*, 517 U.S. 748 (1996).

cation, or exploration: the military accused does not enjoy the constitutionally guaranteed right to trial by jury, as clearly determined by the Supreme Court in *Quirin* and *Milligan*. However, two aspects of these decisions vitiate their value as precedent on this issue. First, both cases advance little and fundamentally flawed analysis in support of a military exception to the Sixth Amendment. Second, both cases reached this con-

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62. *See, e.g.*, *United States v. Witham*, 47 M.J. 297,301 (1997) (“[A] military accused has no Sixth Amendment right to trial by jury.”) (citing *Quirin*, 317 U.S. 1); *United States v. Curtis*, 44 M.J. 106, 132 (1996) (“[T]he Supreme Court has indicated that service members have never had a right to a trial by jury.”) (citing *Quirin*, 317 U.S. 1; *Milligan*, 71 U.S. (4 Wall.) 2), *rev’d as to sentence on reconsideration*, 46 M.J. 129 (1997); *United States v. Smith*, 27 M.J. 242,248 (C.M.A. 1988) (“[T]he right to trial by jury has no application to the appointment of members of courts-martial.”) (citing *Quirin*, 317 U.S. 1; *Milligan*, 71 U.S. (4 Wall.) 2); *United States v. McClain*, 22 M.J. 124, 128 (C.M.A. 1986) (“[C]ourts-martial have never been considered subject to the jury-trial demands of the Constitution.”) (citing *Milligan*, 71 U.S. (4 Wall.) 2); *United States v. Kemp*, 46 C.M.R. 152, 154 (C.M.A. 1973) (making a remarkable connection between distinct elements of the Constitution by asserting that “[c]ourts-martial are not part of the judiciary of the United States within the meaning of Article III . . . . **Consequently**, the Sixth Amendment right to trial by jury with accompanying considerations of [jury selection] has no application to the appointment of members of courts-martial” (emphasis added)); *United States v. Jenkins*, 42 C.M.R. 304, 306 (C.M.A. 1970) (“Under the Fifth and Sixth Amendments to the Constitution, members of the armed forces do not have the right to indictment by grand jury and trial by petit jury . . . .”) (citing *Quirin*, 317 U.S. 1; *Milligan*, 71 U.S. (4 Wall.) 2); *United States v. Ruiz*, 46 M.J. 503, 507 (A.F. Ct. Crim. App. 1997) (“[C]ourts-martial have never been considered subject to the jury trial demands of the Sixth Amendment of the Constitution.”) (citing *Quirin*, 317 U.S. 1); *United States v. Simoy*, 46 M.J. 592, 624 (A.F. Ct. Crim. App. 1997) (Morgan, J., concurring) (“Since *Ex parte Milligan* . . . [the Fifth Amendment’s express] exception has been assumed to extend to the right to trial by a petit jury guaranteed in the Sixth Amendment.”); *United States v. Thomas*, 43 M.J. 550, 589 (N.M. Ct. Crim. App. 1995) (“[I]t is clear that the Supreme Court has held that Article III, as well as the Fifth and Sixth Amendments, do not require jury trials for all cases other than impeachment.”) (citing *Quirin*, 317 U.S. 1), *aff’d in part, rev’d in part on other grounds*, 46 M.J. 311 (1997); *United States v. Gray*, 37 M.J. 751,755 (A.C.M.R. 1993) (“A court-martial has never been subject to the jury-trial demands of Article III of the Constitution.”) (citing *Quirin*, 317 U.S. 1; *Milligan*, 71 U.S. (4 Wall.) 2); *United States v. Corl*, 6 M.J. 914 (N.M.C.M.R. 1979), *aff’d*, 8 M.J. 47 (C.M.A. 1979) (“The Sixth Amendment right to a jury trial, by long-established principle, is inapplicable to trial by courts-martial.”) (citing *Quirin*, 317 U.S. 1; *Milligan*, 71 U.S. (4 Wall.) 2).

On 5 October 1994, the National Defense Authorization Act for Fiscal Year 1995 changed the names of the United States Courts of Military Review and the United States Court of Military Appeals. *See* Pub. L. No. 103-337, 108 Stat. 2663 (1994). The new names are the United States Army Court of Criminal Appeals, the United States Air Force Court of Criminal Appeals, the United States Navy-Marine Corps Court of Criminal Appeals, the United States Coast Guard Court of Criminal Appeals, and the United States Court of Appeals for the Armed Forces.

clusion deep in dicta that had little to do with the actual holdings and on facts having little contemporary application.

### *1. Flawed Analysis*

In *Milligan* and *Quirin*, the Supreme Court reasoned that the framers of the Constitution must have intended to create a military exception to the Sixth Amendment in the absence of an explicit one. In both cases, the Court infers this intent from the express exclusion of the armed forces from the Fifth Amendment's grand jury clause. The language of the Constitution and the process and history of its drafting support the opposite inference.

#### *a. Textual Weaknesses of the Milligan/Quirin Inference*

The framers knew very well how to exempt the military from the strictures of the Bill of Rights and did so within the Bill of Rights. They surgically removed the grand jury clause from among several Fifth Amendment criminal due process rights otherwise apparently applicable to the military. The framers removed it carefully by specifying land and naval forces as well as militia forces in service during exigency. Did they also intend to remove only the jury trial provision from among the several criminal due process rights in the Sixth Amendment? If so, the text of the Sixth Amendment should reflect the exception as clearly and carefully as does the Fifth.<sup>63</sup>

On the other hand, the specific language of the Sixth Amendment calls for trial by a jury "of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . ."<sup>64</sup> Perhaps this provision contemplates juries composed only of permanent residents of the state or district. Courts-martial "jurors" come from the necessarily transient military community. Perhaps the terms "state" and "district" *imply* that the Sixth Amendment does not guarantee a jury in courts-martial. This argument is perhaps the only way, on

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63. See Joseph Remcho, *Military Juries: Constitutional Analysis and the Need for Reform*, 47 *IND. L.J.* 193,206(1972) (asserting that the constitutional jury trial provisions do not infer exclusion of courts-martial).

64. U.S. CONST. amend. VI.

the Sixth Amendment text alone, to imply a military exception. The argument, however, is weak for several reasons.

First, the Sixth Amendment begins, "In all criminal prosecutions . . . ."<sup>65</sup> Second, the immediately preceding Fifth Amendment makes an exception for "**cases** arising in the [armed] forces."<sup>66</sup> Third, looking to the context of this language, the framers apparently added the "state and district" requirement to ensure close proximity among trial, jury, and alleged crime.<sup>67</sup> Before the Revolutionary War, Great Britain feared that colonial juries would undermine the interests of the crown; therefore, Parliament transported many who were charged with criminal misconduct back to England for trial.<sup>68</sup> The *Declaration of Independence* specifically complained of this practice.<sup>69</sup> The "state and district" language and the context of its drafting do not appear to exclude courts-martial from the Sixth Amendment's application. Instead, the language establishes a vicinage requirement, which is generally satisfied in military criminal cases. The argument that the Sixth Amendment right to a jury trial—or any other Bill

65. *Id.*

66. *Id.* amend. V (emphasis added).

67. See JAMES J. GOBERT, JURY SELECTION, THE LAW, ART, AND SCIENCE OF SELECTING A JURY § 2.02 (2d ed. 1990).

68. See *id.* at 36-37 (citing William Wirt Blume, *The Place of Trial of Criminal Cases: Constitutional vicinage and Venue*, 43 MICH. L. REV. 59 (1944); Drew L. Kershen, *vicinage*, 29 OKLA. L. REV. 803 (1976), 30 OKLA. L. REV. 1 (1977)).

69. "[The King of England] has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his assent to their acts of pretended legislation . . . [f]or transporting us beyond Seas to be tried for pretended offenses . . . ." THE DECLARATION OF INDEPENDENCE para. 14 (U.S. 1776), reprinted in SOURCES OF OUR LIBERTIES 319, 320 (Richard L. Perry & John C. Cooper eds., spec. ed. 1990). See THE DECLARATION AND RESOLVES OF THE FIRST CONTINENTAL CONGRESS para. 2 (Oct. 14, 1774), reprinted in SOURCES OF OUR LIBERTIES, *supra*, at 286 (lodging the similar complaint that "it has lately been resolved in parliament, that by force of a statute, made in the thirty-fifth year of the reign of King Henry the Eighth, colonists may be transported to England, and tried there upon accusations for treasons and misprisions").

of Rights provision—is inapplicable by implication simply ignores the plain language of the amendments.<sup>70</sup>

The argument also ignores the text of Article III of the Constitution. This article grants the right to a jury broadly in the “Trial of all Crimes,” save “Cases of Impeachment.”<sup>71</sup> Whether or not Article III provisions are considered at all applicable to courts-martial,<sup>72</sup> this text demonstrates the ability of the framers to create exceptions to important, broadly worded rights where they intended to do so. Further, it shows the precision with which they did so.<sup>73</sup>

### *b. Contextual Weaknesses of the Milligan/Quirin Inference*

The process of the Constitution’s drafting implies that the military is subject to the jury trial requirement of the Constitution. The framers had several opportunities to include a military exception to the right to trial by jury, and they affirmatively rejected such an exception that was contained in submitted proposals. First, some state constitutions, adopted years before the federal Constitution, contained an explicit exception of this nature.<sup>74</sup> Then, some states submitted proposals for a federal Bill of Rights and included this express exception.<sup>75</sup> Finally, one of the principal drafters

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70. See Frederick B. Wiener, *Courts-Martial and the Bill of Rights: The Original Practice*, 72 HARV. L. REV. 1, 266 (1958) (arguing that the entire Bill of Rights is inapplicable to the military by implication); Karen A. Ruzic, Note, *Military Justice and the Supreme Court’s Outdated Standard of Deference: Weiss v. United States*, 70 CHI.-KENT L. REV. 265, 284 (1994) (arguing that various provisions of the Bill of Rights have been denied to service members by implication).

71. U. S. CONST. art. III.

72. See *infra* section C.

73. See Remcho, *supra* note 63, at 206.

74. See, e.g., MASS. CONST. pt. I, art. XII (1780), reprinted in SOURCES OF OUR LIBERTY, *supra* note 69, at 373, 376 (“[T]he legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.”); N.H. CONST. pt. I, art. XVI (1783), reprinted in SOURCES OF OUR LIBERTY, *supra* note 69, at 373, 376 (“Nor shall the legislature make any law that shall subject any person to a capital punishment, excepting for the government of the army and navy, and the militia in actual service, without trial by jury.”). Cf. MD. CONST. Declaration of Rights, ¶ XIX (1776), reprinted in SOURCES OF OUR LIBERTY, *supra* note 69, at 346, 348; PA. CONST. pt. A, ¶ IX (1776), reprinted in SOURCES OF OUR LIBERTY, *supra* note 69, at 328, 330; VA. CONST. Bill of Rights, § 8 (1776), reprinted in SOURCES OF OUR LIBERTY, *supra* note 69, at 311, 312. The Maryland, Pennsylvania, and Virginia Constitutions provided a guarantee of the right to trial by jury, but made no distinction for cases that arose in the armed forces or militia.



of the Bill of Rights, James Madison, proposed that this exception be added to Article III.<sup>76</sup> If the framers believed that they had originally drafted Article III too broadly, they had only to re-engineer it through the amendment process then taking place.<sup>77</sup> If the framers believed that the Sixth Amendment was unclear, they need only have looked to the states' proposals or their own language in the immediately preceding Fifth Amendment to clarify it. The adopted version of the Constitution and the amendments included the exception where the framers intended—Grand Jury presentment and indictment—and affirmatively precluded it where they did not—petit jury.<sup>78</sup>

Finally, the concept of courts-martial that incorporated a jury system was not foreign to the framers. In 1958, Colonel Frederick Weiner argued that the Constitution must have been drafted with the understanding that the Sixth Amendment did not apply to trials by courts-martial.<sup>79</sup> He asserted, as part of his rationale, that service members had never, prior to or during the Constitution's drafting, enjoyed the right to trial by jury.<sup>80</sup> This argument depends on an unnecessarily narrow definition of the word

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75. Maryland submitted seven proposed amendments. The second of the Maryland proposals stated:

[t]hat there shall be a trial by jury in all criminal cases, according to the course of proceeding in the state where the offence is committed; and that there be no appeal from matter of fact, or second trial after acquittal; but this provision shall not extend to such cases as may arise in the government of the land or naval forces.

*A Fragment of Facts, Disclosing the Conduct of the Maryland Convention on the Adoption of the Federal Constitution* (Apr. 21, 1788), reprinted in 2 **DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION** 507, 509-10 (Jonathan Elliot ed., 2d ed., n.p. 1836) [hereinafter **DEBATES**]. Virginia's eighth proposed amendment read:

[t]hat in all criminal and capital prosecutions, a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence, and be allowed counsel in favor, and to a fair and speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty (except in the government of the land and naval forces) nor can he be compelled to give evidence against himself.

*The Debates in the Convention of the Commonwealth of Virginia on the Adoption of the Federal Constitution* (June 27, 1788), in 3 **DEBATES**, *supra*, at 592-93.

“jury.” Indeed, military juries were not drawn from the civilian populace. However, they did exist as a matter of written law.

First, the Provisional Congress of Massachusetts Bay adopted The Massachusetts Articles of War on 5 April 1775.<sup>81</sup> These Articles, which imported wholesale the British court-martial system,<sup>82</sup> mandated general courts-martial of not less than thirteen field grade officers<sup>83</sup> and regimental courts-martial of not less than five officers.<sup>84</sup> They provided to the commanding officer no specific guidance or criteria for selecting members,<sup>85</sup> but they did charge the members to “behave with calmness, decency, and impartiality.”<sup>86</sup> Second, the Second Continental Congress adopted the first American Articles of War on 30 June 1775.<sup>87</sup> The American Articles of War virtually duplicated the Massachusetts articles relating to the administration of courts-martial.<sup>88</sup> Third, an appointed committee drafted the American Articles of War of 1776.<sup>89</sup> Again, the provisions related to courts-martial administration were left largely unchanged.<sup>90</sup> Finally, in

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76. Mr. Madison stated:

The amendments which have occurred to me proper to be recommended by Congress to the State Legislatures, are these:

. . . .

Seventhly. That in article 3d, section 2, the third clause be struck out, and in its place be inserted the clauses following, to wit:

The trial of all crimes (except in cases of impeachments, and cases arising in the land or naval forces, or the militia when on actual service, in time of war or public danger) shall be by an impartial jury of freeholders of the vicinage . . . .

1 ANNALS OF CONGRESS 450-52 (Joseph Gales ed., 1789) (remarks of Mr. James Madison). Note that the Virginia Constitution, which James Madison helped draft in 1776, contained no military exception to the right to trial by jury. *See SOURCES OF OUR LIBERTY*, *supra* note 69, at 308-10. Likewise, Maryland, in 1776, saw no need for such exception. *See id.* at 346, 348. However, Virginia's and Maryland's proposed amendments to the federal Constitution, drafted in 1790, like the later-drafted state constitutions, contained the exception. The developing trend was to include a military exception to the right to trial by jury. The framers resisted this trend and patterned the Sixth Amendment after the state constitutions of the previous decade.

77. *See generally* FRANCIS H. HELLER, *THE SIXTH AMENDMENT* 28-34 (1951) (detailing the House and Senate debates and the committee drafting process of the Sixth Amendment).

1789, following the ratification of the Constitution, Congress reenacted, without change, the Articles of War that were then in force.<sup>91</sup>

78. The *Milligan* concurrence arrived at the opposite conclusion.

Cases arising in the land and naval forces, or in the militia in actual service in time of war or public danger," are expressly excepted from the [grand jury clause of the] fifth amendment . . . and it is admitted that the exception applies to the other amendments as well as to the fifth. Now, we understand this exception to have the same import and effect as if the powers of Congress in relation to the government of the army and navy and the militia had been recited in the amendment, and cases within those powers had been expressly excepted from its operation. The states, most jealous of encroachments upon the liberties of the citizen, when proposing additional safeguards in the form of amendments, excluded specifically from their effect cases arising in the government of the land and naval forces . . . . The amendments proposed by the states were considered by the first Congress, and such as were approved in substance were put in form, and proposed by that body to the states. Among those thus proposed, and subsequently ratified, was that which now stands as the fifth amendment of the Constitution. We cannot doubt that this amendment was intended to have the same force and effect as the amendment proposed by the states. We cannot agree to a construction which will impose on the exception in the fifth amendment a sense other than that obviously indicated by action of the state conventions. *We think, therefore, that the power of Congress, in the government of the land and naval forces and of the militia, is not at all affected by the fifth or any other amendment.*

*Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 137-38 (1866) (Chase, C.J., concurring) (emphasis added). One commentator, Gordon Henderson, argued that most of the Bill of Rights does apply to the military; nevertheless, he maintained that, because state proposals contained a specific exception to the right to trial by jury for the armed forces, the framers meant for such an exception to exist. Gordon D. Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 HARV. L. REV. 293, 303-14 (1957). Henderson reasoned that the failure of the Sixth Amendment to contain the same exception as the Fifth was the result of forgetfulness! *Id.* The following year, Henderson was assailed for his theory that any of the provisions of the Bill of Rights applied to the military. See Wiener, *supra* note 70, at 266. In 1972, Joseph Remcho pointed out that Henderson's analysis was contrary to accepted means of statutory construction. Remcho, *supra* note 63, at 206.

79. See Wiener, *supra* note 70, at 280.

80. See *id.* "Since, however, the significance of this and other constitutional provisions 'is to be gathered not simply by taking the words and a dictionary,' we know—indeed it has never been doubted—that . . . [t]he soldier or sailor never had a right to trial by jury." *Id.* (emphasis added) (citations omitted). Just like the *Milligan* opinion nearly a century earlier, Wiener tried to give weight to his opinion through the mere force of it. He offers no support for his proposition that the framers were of such clear mind about the inapplicability of the Bill of Rights to the military that they had no reason to voice their views.

The commanding officer of 1789 chose the jury. The military accused did not enjoy the right to trial by jury, as constitutionally defined *today*, or even in 1958. However, contrary to the argument of Colonel Weiner, the American service member has always enjoyed the right to a trial by jury. The initial and on-going drafting of Articles of War in colonial times suggests that the constitutional framers understood this. If so, and if they

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81. See WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 12 (2d ed. 1920). The Massachusetts Bay Colony adopted these articles for the governance of its own troops as forces began to muster in Boston for the impending hostilities. *Id.* Other colonial assemblies adopted similar articles shortly thereafter. See *id.* n. 32; DAVID A. SCHLEUTER, *MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE* § 1-6(A) (3d ed. 1992).

82. See SCHLEUTER, *supra* note 81, § 1-6(A).

83. See Massachusetts Articles of War, art. 32, reprinted in WINTHROP, *supra* note 81, at 950.

84. See Massachusetts Articles of War, art. 37, reprinted in WINTHROP, *supra* note 81, at 950.

85. See Massachusetts Articles of War, art. 36, reprinted in WINTHROP, *supra* note 81 at 950.

86. See Massachusetts Articles of War, art. 34, reprinted in WINTHROP, *supra* note 81 at 950. For the analogous British provisions then in effect, see British Articles of War of 1765, § XV, which is reprinted in WINTHROP, *supra* note 81, at 942.

87. See WINTHROP, *supra* note 81, at 22.

88. See American Articles of War of 1775, arts. 33-39, reprinted in WINTHROP, *supra* note 81, at 956.

89. See WINTHROP, *supra* note 81, at 22.

90. See American Articles of War of 1776, § 14, reprinted in WINTHROP, *supra* note 81, at 961, 967. In 1786, these provisions were amended to include a detailed oath by which the members swore to try the case before them "without partiality, favor, or affection." American Articles of War of 1786, § 14, art. 6, reprinted in WINTHROP, *supra* note 81, at 973. Further amendments reduced courts-martial to their present-day minimum sizes of five for general courts-martial and three for regimental (now, special) courts-martial. See American Articles of War of 1786, § 14, arts. 1, 3, reprinted in WINTHROP, *supra* note 81, at 972.

91. See WINTHROP, *supra* note 81, at 23.

The Rules for the Regulation of the United Colonies governed the Navy in 1775. Later, the Articles for the Government of the Navy served as the sea-going counterpart to the Articles of War. Both had provisions for courts-martial similar to the provisions in the Articles of War. See generally EDWARD M. BYRNE, *MILITARY LAW* 2-6 (3d ed. 1981) (providing a synopsis of the origins of naval military law). Under the latter, however, the Navy used only the general court-martial forum. See The Rules and Regulations of the United States Navy, art. 35 (23 Apr. 1800), reprinted in JAMES E. VALLE, *ROCKS AND SHOALS* 285, 291 (1980). See generally WINTHROP, *supra* note 81, at 17-19; SCHLEUTER, *supra* note 81, §§ 1-4, 1-5. These sources contain useful histories of trial by court-martial and the institutions of military discipline and military justice dating to antiquity.

intended to exclude military juries from the constitutional rights relating to jury trial, they would have so indicated.

On the other hand, courts-martial have never included the practice of grand jury presentment and indictment; yet, the Fifth Amendment expressly excepts the military from that practice. The Constitution *fails* specifically to exclude the military from its provisions governing a practice that the military engaged in, petit jury. Elsewhere, the Constitution explicitly excludes the military from its provisions governing a practice in which the military has never engaged, grand jury. The logical conclusion is that the framers recognized the practice by the military of using criminal juries made up of military members. They regulated the practice with the same provisions used to regulate civilian practice. Likewise, the framers recognized and specifically sanctioned the military's existing practice of dispensing with the grand jury **process**.<sup>92</sup>

### *c. The Internal Inconsistency of Milligan*

Incredibly, the *Milligan* Court well understood these principles of textual and contextual constitutional analysis. The Court understood them and *applied* them to the subject at hand. Following a discussion of the limited need in times of emergency to suspend the writ of habeas **corpus**,<sup>93</sup> the Court noted:

The Constitution goes no further. It *does not say* after a writ of *habeas corpus* is denied a citizen, that he shall be tried otherwise than by the course of the common law; *if it had intended this result, it was easy by the use of direct words to have accomplished it*. The illustrious men who framed that instrument were guarding the foundations of civil liberty against the abuses of unlimited power; they were full of wisdom, and the lessons of history informed them that a trial by an established court, *assisted by an impartial jury*, was the only sure way of protecting the citizen against oppression and wrong. Knowing this, they

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92. Winthrop quotes Chief Justice Chase's concurrence in *Milligan* for the proposition that, while "our military law is very considerably older than our Constitution," all United States public law "began either to exist or to operate anew" under the Constitution. WINTHROP, *supra* note 81, at 15.

93. "The privilege of the Writ of Habeas **Corpus** shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." U.S. CONST. art. I, § 9, cl. 2.

*limited the suspension to one great right, and left the rest to remain forever inviolable.*<sup>94</sup>

The Court knew how to look to the plain and direct language of the Constitution as the beginning of constitutional interpretation.

The founders of our government were familiar with the history of [the Revolutionary War]; and secured in a written constitution *every right* which the people had wrested from power during a contest of ages . . . . The provisions of that instrument on the administration of criminal justice are *too plain and direct*, to leave room for misconstruction or doubt of their true meaning. Those applicable to this case are found in that clause of the original Constitution which says "That the trial of all crimes, except in case of impeachment, shall be by **jury**;" and in the fourth, fifth, and sixth articles of the amendments.<sup>95</sup>

Further, the Court was adept at examining constitutional history. The following language appears immediately after the Court quotes the Sixth Amendment in its entirety:

These securities for personal liberty thus embodied, were such as wisdom and experience demonstrated to be necessary for the protection of those accused of crime. And so strong was the sense of the country of their importance, and so jealous were the people that these rights, highly prized, *might be denied them by implication*, that when the original Constitution was proposed for adoption it encountered severe opposition; and, but for the belief that it would be so amended as to embrace them, it would never have been **ratified**.<sup>96</sup>

Given the importance historically accorded the right to trial by jury, especially during the time of the Constitution's formulation, the framers likely contemplated as broad a right as **conceivable**.<sup>97</sup> Neither the express language used nor the circumstances surrounding the Constitution's origin admit of exception to this right for trials by court-martial. *Ex parte Milligan* and *Ex parte Quirin* got it wrong. Courts rely on them today to justify denying military men and women the constitutionally guaranteed right to

94. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 126 (1866) (emphasis added).

95. *Id.* at 119 (emphasis added).

96. *Id.* at 120 (emphasis added).

trial by jury, but they are not paying attention to the weak analysis in these old opinions.<sup>98</sup> They are also not paying attention to the *facts* of these cases. Neither *Milligan* nor *Quirin* concerned the trial of a United States service member. Neither of the cases even concerned trial by court-martial.

## 2. Marginal Application

*Quirin* Concerned a military commission specifically appointed by the President to try the several suspected spies and saboteurs for violations of

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97. This foundation of criminal justice, which is contained in the Sixth Amendment, enjoyed the concerted praise of the nation's forefathers. Alexander Hamilton wrote:

The friends and adversaries of the plan of the [constitutional] convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this; that the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government.

THE FEDERALIST No. 83 (Alexander Hamilton) (Clinton Rossiter ed., 1961). In his first address to Congress, Thomas Jefferson said:

[I]t will be worthy of your consideration whether the protection of the inestimable institution of juries has been extended to all the cases involving the security of our persons and property. Their impartial selection also being essential to their value, we ought further to consider whether that is sufficiently secured in those states where they are named by a marshal depending on the executive will or designated by the court or by officers dependent on them.

Thomas Jefferson, First Annual Message Before the U.S. Congress (Dec. 8, 1801), in THOMAS JEFFERSON, IN HIS OWN WORDS 67, 76 (Maureen Harrison & Steve Gilbert eds., Barnes & Noble Books 1996) (originally published as THOMAS JEFFERSON: WORD FOR WORD (1993)). See generally GODFREY D. LEHMAN, WE THE JURY . . . , at 14 (1997) (quoting several prominent constitutional framers and early national political figures).

98. See *supra* note 61 and accompanying text. The *Loving* court cited pages of the concurrence in *Milligan*, for the proposition established by that Court's majority opinion. See Stephen Lamb, *The Court-Martial Panel Selection Process: A Critical Analysis*, 137 MIL. L. REV. 103, 133 (1992). Lamb notes that the dicta of *Milligan* was "elevated" to the holding of that Court by Justice Marshall, whose dissent in *Solorio v. United States* would have benefited from the opposite. *Id.* See *Solorio v. United States*, 483 U.S. 435 (1987) (abandoning the "service connection" test in favor of the "status" test for UCMJ jurisdiction).

the law of war and the Articles of War.<sup>99</sup> The Court noted that "the Articles [of War] . . . recognize the 'military commission' appointed by military command as an appropriate tribunal for the trial and punishment of offenses against the law of war *not ordinarily tried by court martial* [sic]."<sup>100</sup> *Milligan* also concerned trial by military commission, convened in 1864 by the military commandant of the District of Indiana.<sup>101</sup>

The forum in *Quirin* and *Milligan* was critically distinct from those of their progeny. Military commissions convened before, during, and immediately after World War II were wholly different entities than courts-martial that were conducted under the Articles of War or later under the UCMJ. No separate statute or provisions of the Articles of War governed their constitution or procedure.<sup>102</sup> Military commissions could be composed of as few as three members, and, if this minimum was unobtainable, the flaw was not fatal to the result.<sup>103</sup> In *Quirin*, the President promulgated the complete rules of evidence and procedure in one short paragraph.<sup>104</sup> In fact, over the past half-century, the courts have ignored the specific *Quirin* language that they consistently cite. The courts have used *Quirin* to support the finding that the Sixth Amendment is inapplicable to courts-mar-

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99. *Ex parte Quirin*, 317 U.S. 1, 18 (1942).

100. *Id.* at 27 (emphasis added).

101. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 6 (1866).

102. See WINTHROP, *supra* note 81, at 835-45. The same is true today, although a 1951 addition to the *Manual for Courts-Martial* purports to apply the rules applicable to courts-martial to military commissions. MCM, *supra* note 5, pt. I, ¶ 2(a)(2). This provision was added in anticipation of the passage of the Prisoner of War Geneva Convention (discussed *infra* notes 108-109 and accompanying text). MANUAL FOR COURTS-MARTIAL, UNITED STATES, ch. I, ¶ 2 (1951).

103. See GEORGE B. DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES 309 (3d ed. 1913).

104. The appointing order stated:

The commission shall have power to and shall, as occasion requires, make such rules for the conduct of the proceeding, consistent with the powers of military commissions under the Articles of War, as it shall deem necessary for a full and fair trial of the matters before it. Such evidence shall be admitted as would, in the opinion of the President of the commission, have probative value to a reasonable man. The concurrence of at least two-thirds of the members of the commission present shall be necessary for a conviction or sentence. The record of the trial, including any judgment or sentence, shall be transmitted directly to me for my action thereon.



tial. The Quirin Court stated, "we must conclude that § 2 of Article III and the Fifth and Sixth Amendments cannot be taken to have extended the right to demand a jury to trials by military *commission*."<sup>105</sup>

While the UCMJ provides for trial by military commission under appropriate circumstances,<sup>106</sup> such a forum is perhaps not even viable today. Rules for Courts-Martial 402, 403, 404, and 407 detail the possible dispositions of charges against military personnel; they are silent with regard to military commission.<sup>107</sup> Article 102 of the Third Geneva Convention prevents the trial of prisoners of war by any means other than those used by the detaining power to try its own service members.<sup>108</sup> War crimes author Howard Levie suggests that military commission is no longer available at all for the trial of prisoners of war.<sup>109</sup> One commentator suggested that the UCMJ "grants jurisdiction [to military commissions] *only* over violations of the international laws of war."<sup>110</sup> In any case, to comply with the convention, it appears that the United States would have to try its own service members by military commission before it could attempt to use military commissions for the trial of prisoners of war.<sup>111</sup> The United States has not convened a military commission since the 1949 Diplomatic Conference of Geneva, despite participating in several international armed conflicts since then. Thus, the forum utilized in Quirin and Milligan

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105. *Ex parte Quirin*, 317 U.S. 1, 40 (1942) (emphasis added).

106. *See* UCMJ art. 21 (1994). "The provisions of this chapter . . . do not deprive military commissions . . . of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions . . ." *Id.* Article 2 of the UCMJ provides for jurisdiction over, inter alia, "prisoners of war when in custody of the armed forces" and, "in time of war, persons serving with or accompanying an armed force in the field." *Id.* arts. 2(a)(9), (a)(10). Articles 104 and 106, the punitive provisions for aiding the enemy and spying, respectively, provide for jurisdiction over any person. *Id.* arts. 104, 106. Article 106 is limited to time of war. Both articles provide specifically for trial by court-martial or by military commission. *Id.*

107. MCM, *supra* note 5, R.C.M. 402-404, 407.

108. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 102, T.I.A.S. No. 3364. "A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedures as in the case of members of the armed forces of the detaining power . . ." *Id.*

109. *See* HOWARD S. LEVIE, *TERRORISM IN WAR—THE LAW OF WAR CRIMES* 258-59 (1993). *But see* Robinson O. Everett & Scott L. Silliman, *Forums for Punishing Offenses Against the Law of Nations*, 29 WAKE FOREST L. REV. 509, 517-20 (1994) (suggesting that military commission may be the appropriate forum for trying prisoners of war).

110. Major Michael A. Newton, *Continuum Crimes: Military Jurisdiction over Foreign Nationals Who Commit International Crimes*, 153 MIL. L. REV. 1, 21 (1996).

111. *See* COMMENTARY, III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 476 (Jean S. Pictet ed., 1960).

enjoys a far less influential existence today than it did in 1866 or 1942. Nevertheless, they form the entire precedential foundation for stripping a constitutional right from members of the armed forces.

*Milligan* and *Quirin* fail to justify a military exception to the constitutional right to trial by jury. Courts today fail to account for the weaknesses of these cases, their internal shortcomings, and their limited applicability on an issue of great importance. Much more broadly, courts fail to recognize a fundamental flaw in the denial of this right—they fail to square the denial with the basic principle of American constitutional government, which separates the various powers.

### C. Violation of the Separation of Powers Doctrine

As a fundamental principle of constitutional law in the United States, the separate branches of government check and balance each other.<sup>112</sup> If the executive branch, which is charged with enforcing the law, could effectively control the judicial branch in its decision-making about the application of the law, there would be no need for a judicial branch in the first place. Trial by jury enhances the independence of the various branches and helps to check their independent powers.<sup>113</sup> In the military, where legislative and executive powers run to their maximum anyway,<sup>114</sup> the courts

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112. See STEVEN D. SMITH, *THE CONSTITUTION AND THE PRIDE OF REASON* 45-47 (1998).

The enumerated powers strategy reflects the framers' belief that the way to prevent power from being abused is to diffuse it. . . . [I]t represented the framers' principal response to *all* the kinds of constitutional problems with which we are familiar.

Most obviously, the strategy dealt with what we call "separation of powers" questions; it allocated powers among the organs of government at the national level . . . .

...[T]he enumerated powers strategy was also the framers' principal method of protecting individual rights—a matter which in modern times has become the major constitutional concern.

also remove this Sixth Amendment check on power. The judiciary's two-pronged reasoning is flawed.

### *I. Two-Pronged Analysis*

First, the judiciary asserts that courts-martial derive their sole authority from Article I. Specifically, Section 8 grants Congress power "[t]o raise and support Armies"<sup>115</sup> "[t]o provide and maintain a Navy"<sup>116</sup> and "[t]o make Rules for the Government and Regulation of the land and naval Forces."<sup>117</sup> Second, the courts argue that Article I power is independent of Article III and the Sixth Amendment. The judiciary routinely and thoroughly defers to Congress and the President in handling military matters in general. In *Chappell v. Wallace*,<sup>118</sup> the Supreme Court said, "[i]t is clear that the Constitution contemplated that the Legislative Branch has plenary control over rights, duties, and responsibilities in the framework of the military establishment, including regulations, procedures and remedies related to military discipline; and Congress and the courts have acted in conformity with that view."<sup>119</sup> In *Solorio v. United States*,<sup>120</sup> the Court noted that "[j]udicial deference . . . is at its apogee when legislative action

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113. "The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge." *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (citing *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968)). See LYSANDER SPOONER, *AN ESSAY ON THE TRIAL BY JURY* 6-16 (Boston, Bela Marsh 1852) (strongly advocating the jury's role in checking the legislative and executive functions in England and the United States); GOBERT, *supra* note 67, at 10-12 (discussing the benefits that are secured by the citizenry's check on power through trial by jury); HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 6-11 (1993) (discussing the same).

114. See *infra* notes 119-121 and accompanying text.

115. U.S. CONST. art. I, § 8, cl. 12.

116. *Id.* cl. 13.

117. *Id.* cl. 14.

118. 462 U.S. 296 (1983) (holding that enlisted personnel may not bring civil suit against their seniors alleging racially discriminatory duty assignment, performance evaluations, and disciplinary measures).

under the congressional authority to raise and support armies and make rules and regulations for their governance is **challenged**.”<sup>121</sup>

The ongoing torrent of judicial deference has, from the beginning, swept along the denial of the right to trial by jury. In *Dynes v. Hoover*,<sup>122</sup> the Supreme Court stated:

Congress has the power to provide for the trial and punishment of military and naval offences in the manner then and now practiced by civilized nations; and . . . the power to do so is given without any connection between it and the 3d article of the Constitution defining the judicial power of the United States; indeed . . . the two powers are entirely independent of each other.<sup>123</sup>

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119. *Id.* at 300-301. See *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) (denying a First Amendment challenge to a military restriction on wearing religious apparel openly) (“Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society.”); *Rostker v. Goldberg*, 453 U.S. 57 (1981) (denying a Fifth Amendment due process challenge to gender-discriminatory draft registration) (“This is not, however, merely a case involving the customary deference accorded congressional decisions. The case arises in the context of Congress’ authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference . . .”); *Parker v. Levy*, 417 U.S. 733, 756 (1974) (rejecting First and Fifth Amendment challenges to conviction of conduct unbecoming an officer for encouraging draftees to disobey orders) (“For the reasons which differentiate military society from civilian society, we think Congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which the former shall be governed than it is when prescribing rules for the latter.”).

120. 483 U.S. 435 (1987) (abandoning the “service connection” test in favor of the “status” test for UCMJ jurisdiction).

121. *Id.* at 447 (citations omitted). See *Middendorf v. Henry*, 425 U.S. 25, 43 (1976) (“In making such an analysis [balancing the interests of the individual against those of the regime to which he is subject] we must give particular deference to the determination of Congress, made under its authority to regulate the land and naval forces, that counsel should not be provided in summary courts-martial.”). In *Rostker v. Goldberg*, the Supreme Court recalled that it “has consistently recognized Congress’ ‘broad constitutional power’ to raise and regulate armies and navies.” 453 U.S. at 65 (citation omitted). The Court added that “[n]ot only is the scope of Congress’ constitutional power in this area broad, but the lack of competence on the part of the courts is marked.” *Id.* The *Goldman* Court echoed this sentiment. “Not only are courts ‘ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have,’ but the military authorities have been charged by the Executive and Legislative branches with carrying out our nation’s military policy.” 475 U.S. at 507-08 (quoting Chief Justice Earl Warren, *The Bill of Rights and the Military*, The Third James Madison Lecture at the New York University Law Center (Feb. 1, 1962), in 37 N.Y.U. L. REV. 181, 187 (1962)).

122. 61 U.S. (20 How.) 65 (1857).

In *United States v. Kemp*,<sup>124</sup> the Court of Military Appeals (COMA) proclaimed:

Courts-martial . . . derive their authority from the enactments of Congress under Article I of the Constitution, pursuant to congressional power to make rules for the government of the land and naval forces. Consequently, the Sixth Amendment right to trial by jury with accompanying considerations of constitutional means by which juries may be selected has no application to the appointment of members of courts-martial.<sup>125</sup>

Neither the foregoing language of the Section 8 clauses nor that of any other constitutional war power suggests that the language of Article III or the Sixth Amendment is inapplicable in the military context. Further, none of these provisions suggests abandonment of the separation of powers doctrine. On the contrary, the grant to Congress in Section 8 of Article I—consistent with the grant of legislative powers in Section 1 of that Article—is to make rules, not to exercise judicial power. The specific language of Clause 14 includes a grant of power to make rules for the “government” as well as the “regulation” of the armed forces.<sup>126</sup> Should this clause be interpreted so broadly as to abrogate separation of powers principles in the military context? Such a construction ignores the framers’ fear of a powerful and independent military.<sup>127</sup> In the absence of specific language to the

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123. *Id.* at 79.

124. 46C.M.R. 152 (C.M.A. 1973).

125. *Id.* at 154.

126. “The term ‘Regulation’ itself implies, for those appropriate cases, the power to try and to punish.” *Relford v. Commandant*, 401 U.S. 355, 367 (1971) (applying *O’Callahan v. Parker*, 397 U.S. 934 (1970), *overruled by* *Solorio v. United States*, 483 U.S. 435 (1987), and deciding that an offense committed on post that violates personal or proprietary security is service connected and may be tried by court-martial). “It is not necessary to attempt any precise definition of the boundaries of this power. But may it not be said that government includes . . . the regulation of internal administration?” *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 138-39 (1866) (Chase, C.J., concurring).

127. *See, e.g.,* THE DECLARATION OF INDEPENDENCE paras. 12, 13 (U.S. 1776), *reprinted in* SOURCES OF OUR LIBERTY, *supra* note 69, at 319, 320 (complaining that England had “kept among us, in times of peace, standing armies, without the consent of our legislatures” and had “affected to render the military independent of, and superior to the civil power”); VA. CONST. Bill of Rights, § 13 (1776), *reprinted in* SOURCES OF OUR LIBERTY, *supra* note 69, at 311, 312 (declaring “[t]hat a well-regulated militia . . . is the proper, natural, and safe defence of a free State; that standing armies, in time of peace, [are] dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power”).

contrary, the framers likely intended the judiciary to exercise control over military justice proportional to their control over civilian justice.<sup>128</sup>

Finally, the argument that the principles of "Article III" courts do not apply to "Article I" courts is itself textually and contextually flawed. The argument ignores the very exception contained within the jury trial clause. "Cases of Impeachment" are the sole province of Congress under Article I.<sup>129</sup> Yet, Article III specifically excludes them from its own operation. Therefore, the tenets of Article III must extend beyond just those cases arising in courts established under Article III. Just like "cases of impeachment," "cases arising in the land or naval forces" stem from the powers of

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128. The Constitution certainly makes no distinction. "The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1. "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . ." *Id.* § 2. This section continues with numerous examples of cases or controversies to which the judicial power shall apply. One of the examples specifically applies the judicial power "to Controversies to which the United States shall be a party . . ." *Id.* These first two sections of Article III are broadly worded. They contain no hint of exception for the military or any other specialty jurisdiction. The language here sweeps within the judicial power of the United States "all Cases. . . arising under this Constitution," which, on its face, includes courts-martial. Conversely, the language of Article I grants Congress power "To *make Rules* for the Government and Regulation of the land and naval Forces." *Id.* art. I, § 8, cl. 14 (emphasis added). Inference and speculation is the only way to conclude from this language (together with all of those provisions known as the war powers) that courts-martial are thereby beyond the reach of Article III. By attempting to make the case for judicial deference to the legislative and executive branches in military affairs, the Court in *Orloff v. Willoughby* instead highlights the importance of separation of powers even in this area.

[J]udges are not given the task of running the Army. The responsibility . . . rests upon the Congress and upon the President of the United States and his subordinates . . . . Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as *the Army must be scrupulous not to intervene in judicial matters.*

*Orloff v. Willoughby* 345 U.S. 83, 93-94 (1953) (denying writ of habeas corpus to review military draft induction) (emphasis added). See *United States v. Newak*, 15 M.J. 541, 548 (A.F.C.M.R. 1982) (Miller, J., concurring), *rev'd in part*, 24 M.J. 238 (C.M.A. 1987).

129. "The Senate shall have the sole Power to ~~try~~ all Impeachments . . . . When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present." U.S. CONST. art. I, § 3, cl. 6. "Judgment in Cases of Impeachment shall not extend further than to removal from Office . . . but the party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment, and Punishment, according to Law." *Id.* cl. 7.

Congress under Article I. The framers expressly excepted the former from the language of Article III that created the right to trial by jury; they did not except the latter. Commentator Gordon Henderson advanced this point in the 1950s.<sup>130</sup> Commentator Joseph Remcho reasserted it in the 1970s.<sup>131</sup> Their observations on the text of the Constitution were fundamental lessons worth repeating *and applying* in the 1990s and beyond.

## 2. Progress on Other Fronts

Selection of court-martial members by the convening authority is a classic violation of the principle of separation of powers.<sup>132</sup> The Supreme Court of Canada acknowledged this in 1992. In *Généreux v. The Queen*,<sup>133</sup> that Court held that judicial independence will not accommodate selection of general court-martial members by the convening authority.<sup>134</sup> “In particular, it is unacceptable that the authority that convenes the court martial, i.e., the executive, which is responsible for appointing the prosecutor, should also have authority to appoint members of the court martial, who serve as the triers of fact.”<sup>135</sup> The court was interpreting, for the first time, the impact of the 1982 Canadian Charter of Rights and Freedoms<sup>136</sup> on military law.<sup>137</sup> The Charter guarantees that an accused is “to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal . . .”<sup>138</sup> The Court found that the military’s jury selection procedure violated the “independence” prong of this guarantee.

It is unacceptable that an external force be in a position to interfere in matters that are directly and immediately relevant to the adjudicative function, for example, . . . sittings of the court and court lists. Although there must of necessity be some institutional relations between the judiciary and the executive, such relations must not interfere with the judiciary’s liberty in adjudicating individual disputes and in upholding the law and values of the Constitution.<sup>139</sup>

The Court stressed that lack of tribunal independence, real or perceived, violates the Charter.<sup>140</sup> The Court found that “a reasonable person, familiar with the constitution and structure of the General Court Martial”

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130. See Henderson, *supra* note 78, at 301.

131. See Remcho, *supra* note 63, at 206.

would conclude that the tribunal did not enjoy the protections necessary

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132. A 19th century commentator angrily, though cogently, summarized the violation of this principle.

Since 1285, seventy years after Magna Carta, the common law right of all free British subjects to eligibility as jurors has been abolished, and the qualifications of jurors have been made a subject of arbitrary legislation. In other words, the government has usurped the authority of *selecting* the jurors that were to sit in judgment upon its own acts. This is destroying the vital principle of the trial by jury itself, which is that the legislation of the government shall be subjected to the judgment of a tribunal, taken indiscriminately from the whole people without any choice by the government, and over which the government can exercise no control. If the government can select the jurors, it will, of course, select those who it supposes will be favorable to its enactments.

SPOONER, *supra* note 113, at 148. Spooner was indicting the civilian practices of England and the United States, but his words capture the problem of present-day jury selection under the UCMJ.

The Magna Carta, which was signed by King John in 1215, is accepted as the first written guarantee of trial by jury and is presently saluted for this virtue. LLOYD E. MOORE, *THE JURY* 49 (1973). Its 39th clause provides that "[n]o freeman shall be seized, or imprisoned, or dispossessed, or outlawed, or in any way ruined; nor will we condemn him, nor will we commit him to prison, excepting by the legal judgment of his peers, or by the laws of the land." MAGNA CARTA para. 39 (Eng. 1215), reprinted in J.C. HOLT, *MAGNA CARTA* 461 (2d ed. 1992).

At Runnymede, at Runnymede,  
Your rights were won at Runnymede!  
No freeman shall be fined or bound,  
Or dispossessed of freehold ground,  
Except by lawful judgment found  
And passed upon him by his peers.  
Forget not, after all these years,  
The Charter signed at Runnymede.

Rudyard Kipling, *The Reeds of Runnymede* (1911).

133. [1992] S.C.R. 259.

134. *Id.* at 260. The Canadian member selection process involved less specific criteria than the American process, but was otherwise similar and was governed by statute. See National Defense Act, R.S.C., ch. N-5, §§ 166-170 (1985) (Can.). The Supreme Court of Canada also held that the Canadian constitutional guarantee of judicial independence required military judges to serve a fixed term of office. *Généreux* [1992] S.C.R. at 260.

135. *Généreux* [1992] S.C.R. at 263.

136. Constitution Act, R.S.C. (1982) (Can.).

137. See *Généreux* [1992] S.C.R. at 280-81.

138. Constitution Act, R.S.C. § 11(d).



for judicial independence.<sup>141</sup>

The principles of the Canadian guarantee of independent and impartial trial are similar to those of Article III and the Sixth Amendment to the United States Constitution. The pre-1992 Canadian court-martial system was similar to the contemporary United States military system. Canada is geographically, politically, and culturally the closest nation in the world to the United States. These parallels suggest change in the court-martial system in the United States.

The framers ratified the Constitution and adopted the Bill of Rights in the late eighteenth century. The Supreme Court decided *Exparte Milligan* in the second half of the nineteenth century and *Exparte Quirin* in the first half of the twentieth century. Courts continue to rely on these decisions today for *their* interpretation of the Constitution. Doing so, the courts ignore the major developments of the second half of the twentieth century that bear directly on the right to trial by jury in courts-martial.

#### D. Application of the Sixth Amendment to the Military Today

Even if the framers believed that Article III and the Sixth Amendment were inapplicable to courts-martial and even if those provisions did not apply in 1866, or 1942, they should apply *now*.

It is no answer to . . . insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time . . . . When we are dealing with the words of the Constitution . . . “we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.”<sup>142</sup>

During the last forty years, the Supreme Court rendered several decisions that contain important interpretations of the constitutional right to

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139. *Généreux* [1992] S.C.R. at 286.

140. *Id.*

141. *Id.* at 308.

142. *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 442-43 (1934) (quoting *Missouri v. Holland*, 252 U.S. 416, 433 (1920) (asserting broad and widely accepted fundamental tenets of constitutional interpretation)).

trial by jury. During the last forty years, Congress enacted important legislation that implements the constitutional right to trial by jury. During the last forty years, the courts and Congress specifically extended many other Bill of Rights protections to service members. Finally, court-martial jurisdiction has expanded most notably during the last decade.

### 1. *The Recently Developed Character of the Sixth Amendment*

The Supreme Court gave constitutional significance to the impartial selection and fair cross-section requirements as recently as the late 1960s and 1970s.<sup>143</sup> Those principles have appeared throughout history sporadically,<sup>144</sup> but federal jurisdictions selected juries by the same means as practiced in the local state courts until 1948.<sup>145</sup> Methods varied; some dis-

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143. See *supra* notes 30-39 and accompanying text.

144. Scholars and historians disagree over the ancient influences on the development of the English jury system. See generally MOORE, *supra* note 132, at 1-34 (detailing various theories and their sources pertaining to possible Greek, Roman, Scandinavian, Germanic, Frankish, and other influences on the development of the English jury preceding the Norman conquest); ROBERT VON MOSCHZISKER, TRIAL BY JURY § 65 (1922) (identifying conflicting sources on the origins of trial by jury); WILLIAM FORSYTH, TRIAL BY JURY 1-12 (1875). Over the centuries, the representational character and the method of selection of juries varied widely. Early Greek juries evolved from bodies that were purely constituted of nobility to large groups of citizenry selected by lot. See MOORE, *supra* note 132, at 2. Roman juries were selected by the senate from among its own members to sit for one year. See MOSCHZISKER, *supra*, §§ 13-14. Following the Norman conquest of England in 1066, methods of selection and the representational character of juries varied. In the twelfth century, juries sometimes consisted of entire townships or representatives from several townships. See FORSYTH, *supra*, at 88.

Criminal jury trials evolved during the twelfth century, first as a matter of privilege—the accused could buy one—then as a matter of right. See MOSCHZISKER, *supra*, § 54. Even following the Magna Carta, juries were selected by law enforcement agents, nobility, or even royalty. See MOORE, *supra* note 132, at 56-70; MOSCHZISKER, *supra*, §§ 29-43. During the thirteenth and fourteenth centuries, juries began to develop from groups of “witnesses,” who had foreknowledge of the facts of the case, to bodies of “twelve good and lawful men of the neighborhood,” who were summoned by the sheriff (mayor) and instructed on impartiality by the court. FORSYTH, *supra*, at 131-32. See MOORE, *supra* note 132, at 59. By the early eighteenth century, juries were selected from among those peers of the accused who were between twenty-one and seventy years old, not outlaws or convicts, and who were of the highest respectability in the community. In felony cases, apparently balancing the right of the government to select the panel, the accused enjoyed between twenty and thirty-five peremptory challenges compared with none for the crown. See MOORE, *supra* note 132, at 68-69. While the sheriff would choose the panel on the basis of these qualifications, the actual jurors were ordinarily selected from the panel by lot. See *id.*

145. See 1 EDWARD J. DEVITT & CHARLES B. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 2.01 (3d ed. 1977).

tricts used voter registration lists, tax rolls, or local association and organization lists to gather potential jurors.<sup>146</sup> Others used "key men," citizens of the community, chosen by court clerk or jury commissioner and "likely to be acquainted with persons possessed of the requisite qualifications" for jury duty.<sup>147</sup>

Lack of uniformity in selection methods and discriminatory practices led the federal government to seek reform. Throughout the 1940s, 1950s, and 1960s, Congress sponsored several conferences, held numerous hearings, and experimented with various laws concerning federal jury selection.<sup>148</sup> The effort culminated in the Federal Jury Selection and Service Act of 1968.<sup>149</sup> This legislation established that:

It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose.<sup>150</sup>

Under this statute, random selection of the initial pool of jurors is from voter registration lists or other sources "where necessary to foster the policy and protect the rights served by [the statute]."<sup>151</sup> The random selection

146. See AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE § 15-2.1, commentary at 15-33 (1980).

147. DEVITT & BLACKMAR, *supra* note 145, § 2.03. The "key man" system was regularly employed in state and federal jurisdictions until 1968. See JEFFREY ABRAMSON, WE, THE JURY 99 (1994).

148. See DEVITT & BLACKMAR, *supra* note 145, §§ 2.01-2.03.

149. 28 U.S.C. §§ 1821, 1861-1869, 1871 (1964) (amended 1968, 1970, 1972, 1978, 1983, 1986, 1988, 1990, 1992).

150. 28 U.S.C. § 1861 (1994). Qualifications include: eighteen years of age; United States citizenship; one year of district residency; ability to speak, read, write, and understand English; mental and physical ability to perform jury duty; and a record reflecting no state or federal felony charges pending. *Id.* § 1865. The act exempts active duty service members, firemen, policemen, and public officers of the United States from federal jury service. *Id.* § 1863(b)(6). Volunteer safety personnel are excused upon individual request. *Id.* § 1863(b)(5)(B). If the district court finds that jury service would impose "undue hardship or extreme inconvenience" on a specific group or class, individual requests for excusal may be granted. *Id.* § 1863(b)(5)(A). Race, color, religion, sex, national origin, or economic status are impermissible characteristics for exclusion. *Id.* § 1862.

of the actual jury venire must be by jury wheel or other random lot selection process.<sup>152</sup>

The language of this statute is broad, using phrases like "policy of the United States," "all litigants," and "all citizens."<sup>153</sup> The statute makes no exception for trial by court-martial. The evolution of "civilian" Sixth Amendment jurisprudence, which is illustrated by the cases of the 1960s and 1970s and this comprehensive congressional endeavor, supports a similar evolution of "military" Sixth Amendment jurisprudence.

## 2. *The Recently Developed Application of the Constitution to the Military*

Over the last forty years, courts have specifically applied an increasing number of Bill of Rights provisions to the armed forces. In *United States v. Tempia*,<sup>154</sup> the COMA extended Fifth Amendment protections, under *Miranda v. Arizona*,<sup>155</sup> to members of the armed forces. The court stated that "[t]he time is long since past . . . when this Court will lend an attentive ear to the argument that the members of the armed services are, by reason of their status, ipso facto deprived of all protections of the Bill of Rights."<sup>156</sup>

### a. *Recent Sixth Amendment Application*

In *Middendorfv. Henry*,<sup>157</sup> the Supreme Court noted that "[t]he question of whether an accused in a court-martial has a constitutional right to counsel has been much debated and never squarely resolved."<sup>158</sup> The Court declined to resolve this broad issue and decided instead that a summary court-martial is not a "criminal prosecution" within the meaning of

151. Id. § 1863(b)(2).

152. Id. § 1863(b)(4). A court clerk or jury commissioner manages the selection process. Id. § 1863(b)(1).

153. See *id.*

154. 37 C.M.R. 249 (C.M.A. 1967).

155. 384 U.S. 436 (1966).

156. *Tempia*, 37 C.M.R. at 253.

157. 425 U.S. 25 (1976).

158. Id. at 33 (citations omitted). To illustrate the debate, the Court cites various sources and cases containing opposing views and holdings.

the Sixth Amendment.<sup>159</sup> In a footnote, however, the Court characterized the dissent as follows:

Since under [the dissent's] analysis the Sixth Amendment applies to the military, it would appear that not only the right to counsel but the right to jury trial, which is likewise guaranteed by that Amendment, would come with it . . . . Whatever may be the merits of "selective incorporation" under the Fourteenth Amendment, *the Sixth Amendment makes absolutely no distinction between the right to jury trial and the right to counsel.*<sup>160</sup>

Two years later, the COMA noted:

As to the constitutional right to consult counsel, we have followed the lead of the Supreme Court of the United States and held that at every "critical" stage of the prosecution the Constitution requires that a military accused have recourse to the experienced advice of counsel.

The realities of modern criminal prosecution have compelled the highest court of the land to broadly construe the guarantees of the Sixth Amendment. The governing rationale of the Supreme Court has been that the person confronting the puissance of the State will not be forced to stand alone but will be guaranteed his right to a fair trial consistent with the adversary nature of criminal prosecution.<sup>161</sup>

This language foretold years of judicial acknowledgment of, and commitment to, the military accused's Sixth Amendment right to counsel.<sup>162</sup> The COMA's 1963 analysis in *United States v. Culp*,<sup>163</sup> also suggests that the Sixth Amendment right to trial by jury may be linked to that amendment's right to counsel.

In his *Commentaries on the Constitution* (1833), Justice Joseph Story pointed out that the protections of the Sixth Amendment, except the right of compulsory process and the right to have the assistance of counsel, "does but follow out the established course of the common law in all trials for crimes" . . . . Justice Story

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159. *Id.* at 34.

160. *Id.* at 34 n. 13 (emphasis added).

161. *United States v. Jackson*, 5 M.J. 223,224 (C.M.A. 1978) (citations omitted).

points out [that] "*the remaining clauses [of the Sixth Amendment] are of more direct significance and necessity.*" The distinction thus noted between the right to counsel and the other provisions of the Sixth Amendment, I believe, become material in our consideration of the question now before us.<sup>164</sup>

In *Culp*, the COMA held that the military accused did not, as a matter of right, enjoy the Sixth Amendment right to counsel at special courts-martial.<sup>165</sup> The court relied heavily on its own historical analysis of the apparently more significant right to trial by jury and its purported inapplicability to the military.<sup>166</sup> Since *Culp*, the judiciary has unequivocally *mandated* that the Sixth Amendment right to counsel applies to the military accused. Surely, then, the Sixth Amendment right to trial by jury, "of more direct significance and necessity," should now also apply to the military accused with equal or greater force.<sup>167</sup>

#### *b. Recent Fifth Amendment Application*

One of the protections of the Bill of Rights that is specifically granted to members of the armed forces is the due process guarantee of the Fifth Amendment.<sup>168</sup> In fact, the courts have chosen the Fifth Amendment over

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162. See, e.g., *United States v. Walters*, 45 M.J. 165, 166 (1996) ("Based on the Sixth Amendment right to counsel and the Uniform Code of Military Justice, this [c]ourt has been diligent in ensuring the right to effective assistance of counsel, starting with the pretrial stage through appellate review.") (citations omitted); *United States v. Ingham*, 42 M.J. 218, 223 (1995) ("Article 27, UCMJ, and the Sixth Amendment of the Constitution guarantee a military accused the right to effective assistance of counsel. [The Supreme Court's test for determining effective assistance] has been applied by Courts of Military Review and is compatible with existing military standards.") (citations omitted); *United States v. Scott*, 24 M.J. 186, 187-88 (C.M.A. 1987) ("By virtue of Article 27, UCMJ, as well as the Sixth Amendment of the Constitution, a military accused is guaranteed the effective assistance of counsel. This guarantee applies whether counsel is detailed, or selected by the accused."); *United States v. Wattenbarger*, 21 M.J. 41, 43 (C.M.A. 1985) ("Th[e] constitutional right to counsel [attaches] 'at . . . the time that adversary judicial proceedings have been initiated against him . . . whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.' In the military, this sixth-amendment right to counsel does not attach until preferal of charges.") (citations omitted); *United States v. Annis*, 5 M.J. 351, 353 (C.M.A. 1978) ("[R]egarding effective assistance of counsel, we observe that this right is extended to the military accused both by the Sixth Amendment to the Constitution and the Uniform Code of Military Justice.").

163. 33 C.M.R. 411 (C.M.A. 1963).

164. *Id.* at 417-18 (emphasis added) (citations omitted).

165. *Id.* at 428.

the Sixth (and Article 111) to analyze jury selection in the military. In *United States v. Crawford*,<sup>169</sup> the COMA stated:

Constitutional due process includes the right to be treated equally with all other accused[s] in the selection of impartial triers of the facts. Methods of selection which are designed to produce a court membership which has, or necessarily results in, the appearance of a "packed" court are subject to **challenge**.<sup>170</sup>

In *United States v. Santiago-Davila*,<sup>171</sup> the COMA applied *Batson v. Kentucky*<sup>172</sup> to courts-martial. The *Santiago-Davila* court concluded that an accused has an equal protection right, through the due process clause of the Fifth Amendment, to be tried by a panel that is free from the systematic exclusion of any cognizable racial group.<sup>173</sup> In *United States v. Carter*,<sup>174</sup>

166. The Court reasoned that:

We have seen that the apparently mandatory provision of the Sixth Amendment of trial by jury is, when correctly interpreted, restricted by the common law as it existed when the amendment was adopted, its contemporary interpretation, and in the light of the long-continued and consistent interpretation thereof. Does the same result follow as to assistance of counsel? I believe it does. The law existing at the time of adoption would seem to be most forcefully illustrated by the British Articles of War of 1765, existing at the beginning of the Revolution, the Articles enacted by the Continental Congress, and the Articles enacted by the first Congress, before the adoption of the Bill of Rights.

... [The British] articles contain no reference to assistance of counsel for the accused, and no such right existed.

... [In] The Articles of War enacted by the Continental Congress on September 20, 1776 ... [a]gain, there is no provision for counsel for the accused.

*Id.* at 418-22.

167. Interestingly, three years before *Culp* was decided, the COMA held that the confrontation clause of the Sixth Amendment requires that a military accused must be afforded the opportunity to be present for the taking of a written deposition. See *United States v. Jacoby*, 29 C.M.R. 244 (C.M.A. 1960).

168. "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ." U.S. CONST. amend V.

169. 35 C.M.R. 3 (C.M.A. 1964).

the court maintained that “the accused does possess a due-process right to a fair and impartial factfinder.”<sup>175</sup>

170. *Id.* at 6 (citing *United States v. Hedges*, 29 C.M.R. 458 (C.M.A. 1960); *United States v. Sears*, 20 C.M.R. 377 (C.M.A. 1956)). The *Hedges* court affirmed a board of review decision to set aside the conviction because the panel of nine included seven members who were involved in some aspect of law enforcement—the president of the court was a lawyer, and two members were provost marshals. *Hedges*, 29 C.M.R. at 459. The court noted that “neither a lawyer nor a provost marshal is per se disqualified . . . .” *Id.* However, the court agreed with the board of review that “the composition of the court-martial was such as to give the distinct appearance that the members were ‘hand-picked’ by the government.” *Id.* at 458. In *Sears*, where the accused had hired a civilian attorney, the convening authority assigned three judge advocates to the panel “to neutralize any attempt by [civilian] counsel to influence the court to rule in favor of the accused.” *Sears*, 20 C.M.R. at 384. One of the judge advocates survived challenge. Throughout the trial, he passed notes, which advised how to rule on objections, to the President of the court. *Id.* The court found this to “smack of court-packing.” *Id.*

171. 26 M.J. 380 (C.M.A. 1988).

172. 476 U.S. 79 (1986) (disallowing racially-based peremptory challenges by the prosecutor).

173. *Santiago-Dada*, 26 M.J. at 390. *Accord* *United States v. Tulloch*, 47 M.J. 283 (1997); *United States v. Moore*, 28 M.J. 366 (C.M.A. 1989). In *United States v. Witham*, the court held “that gender, like race, is an impermissible basis for the exercise of a peremptory challenge by either the prosecution or a military accused.” 47 M.J. 297, 298 (1997).

174. 25 M.J. 471 (C.M.A. 1988).

175. *Id.* at 473 (citing *United States v. Thomas*, 22 M.J. 388 (C.M.A. 1986), *cert. denied*, 479 U.S. 1085 (1987)). The Fifth Amendment-Sixth Amendment distinction is sometimes confused. In *United States v. Curtis*, the CAAF stated that the accused “has a Sixth Amendment right to a fair and impartial jury.” 44 M.J. 106, 133 (1996), *rev’d us to sentence on recon.*, 46 M.J. 129 (1997). The court was addressing issues of pretrial publicity, almost certainly not contemplating the full sweep of this broad language as it might apply to jury selection. The following year, however, the court managed to confuse the issue head on.

Membership on a court-martial panel is limited statutorily by Congress to those [meeting the criteria of] Art. 25(d)(2), UCMJ.

A military accused “has a *Sixth Amendment* right to a fair and impartial jury” as factfinder, and the selection of court members and the conduct of their deliberations is governed by statutory and constitutional provisions that are designed to ensure fair and impartial consideration . .

*United States v. Hardy*, 46 M.J. 67, 74 (1997) (emphasis added) (holding that the military judge did not err in declining to give a jury nullification instruction). Ironically—given the patchwork application of Sixth Amendment rights to service members—the opinion continues, “[n]either Congress nor the President. . . has authorized a court-martial panel to pick and choose among the laws and rules that are applicable to military life in order to determine which ones should be obeyed by members of the armed forces.” *Id.*



This Fifth Amendment guarantee of a fair and impartial factfinder *sounds* better than that available under the Sixth. After all, is not the Supreme Court's fair cross-section requirement under the latter simply a means to this end? Unfortunately, "fair and impartial," rather than a *firm* and established standard, operates sporadically as a general notion without much bite. The cases discussed in Part III, below, involving unlawful command influence in the member selection process reflect the judiciary's inconsistent or indecisive application of the principle, where the courts apply it at all.

The use of the Fifth Amendment to structure the rights of the accused concerning panel selection and composition have led to some twisted results. In *Crawford*, the COMA held that the deliberate inclusion of an African-American panel member was not a violation of equal protection.<sup>176</sup> Instead, the court recognized this as an effort to establish on the panel "a fair representation of a substantial part of the community."<sup>177</sup> Later, in *United States v. Smith*,<sup>178</sup> the court came to the same conclusion regarding gender distinctions.

[A] convening authority is not precluded by Article 25 from appointing court-martial members in a way that will best assure that the court-martial panel constitutes a representative cross-section of the military community.

. . . Congress has not required that court-martial panels be unrepresentative of the military population. Instead, Congress has authorized deviations from the principle of representativeness, if the criteria of Article 25 are complied with. Thus, a commander is free to require representativeness in his court-martial panels and to insist that no important segment of the military community — such as blacks, Hispanics, or women — be excluded from service on court-martial panels.

. . . .

In our view, a convening authority may take gender into account in selecting court members, if he is seeking in good faith to assure that the court-martial panel is representative of the military population.<sup>179</sup>

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176. *United States v. Crawford*, 35 C.M.R. 3, 13 (C.M.A. 1964).

177. *Id.*

178. 27 M.J. 242 (C.M.A. 1988).

So, the accused has no constitutional right to fair cross-sectional representation, but the government does? This turns the Sixth Amendment and its foundations on their ear and ignores the convening authority's affirmative obligation to select the "best qualified" under Article 25.<sup>180</sup> The court is apparently willing to bend Article 25 for the sake of increasing racial and gender diversity in the military justice process. They couch this willingness in terms of a Fifth Amendment *right of the accused* to be tried by a diverse jury. Unfortunately, the right obtains only when the *government* desires to appear politically correct.<sup>181</sup> The accused is still prevented from asserting *his* right to panel diversity under the Sixth Amendment.

### 3. Expanding Military Jurisdiction

Historically, military courts did not exercise jurisdiction over common law crimes, even in time of war.<sup>182</sup> It was not until fifty years after *Milligan* was decided that courts-martial jurisdiction reached common law crimes in time of peace. Under the Articles of War of 1806,<sup>183</sup> the first complete revision following the adoption of the Constitution,<sup>184</sup> Congress left common law crimes outside the jurisdiction of courts-martial altogether.<sup>185</sup> In 1863, Congress extended military jurisdiction over common law crimes, but only in time of war.<sup>186</sup> Congress substantially revised the Articles of War in 1916.<sup>187</sup> Except for the capital crimes of rape and mur-

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179. *Id.* at 249. See *United States v. Lewis*, 46 M.J. 338, 341 (1997) (citing *Smith* for the proposition that the convening authority may *insist* that a panel contain women and racial minorities—"important segment[s] of the military community").

180. See Lamb, *supra* note 98, at 143 (noting the incompatibility between the clearly stated "best qualified" criteria of Article 25 and notions of cross-sectional representation).

181. Jeffrey Abramson makes some compelling arguments that *purposefully* seeking diversity may be dangerous.

[T]he purpose of the cross-sectional jury [is] not to recruit jurors to represent the "deep-rooted biases" of their section of town; it [is] to draw jurors together in a conversation that, although animated by different perspectives, still [strives] to practice a justice common to all perspectives. This is a noble justification for the cross-sectional ideal and one that defends the aspiration for jurors who render verdicts across all the fault lines of identity in America.

ABRAMSON, *supra* note 147, at 127. Purposefully creating diverse panels may simply serve to point out racial, gender, or cultural differences. Jurors may feel compelled to voice or to vote a particular agenda based on the quota they know they are filling. See *id.* at 101.

der, and absent the affirmative assertion of civilian jurisdiction, Congress made common law crimes punishable by peacetime courts-martial.<sup>188</sup> In

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182. European methods of military command, control, and discipline from the eleventh through the sixteenth centuries took on some vestiges of criminal trials, but no true distinction between civil and military systems of justice emerged. *See* WINTHROP, *supra* note 81, at 45-46; SCHLEUTER, *supra* note 81, at 13. Beginning with the Mutiny Act of 1689, British courts-martial were granted limited peacetime jurisdiction over the offenses of mutiny, sedition, and desertion. *See* WINTHROP, *supra* note 81, at 19. *See also* Mutiny Act of 1689, 1 W. & M. ch. 4, *reprinted in* WINTHROP, *supra* note 81, at 929. A detachment of mainly Scottish troops mutinied and deserted in the face of orders from the king to sail for Holland. England was not at war, and, at the time, courts-martial exercised jurisdiction in time of war only. Though concerned about a standing army in peacetime, subject to its own governing regulations, Parliament assented to the peacetime jurisdiction of military courts over the offenses of mutiny, sedition, and desertion only. The act was to remain in effect for just over six months, but Parliament passed successive Mutiny Acts until 1718. *See* WINTHROP, *supra* note 81, at 19-20; SCHLEUTER, *supra* note 81, at 21. The act expressly mandated civilian trials for service members otherwise accused. "[N]oe man may be forejudged of life or limbe, or subjected to any kinde of punishment by martiall law, or in any other manner than by the judgment of his peeres, and according to the knowne and established laws of this realme." Mutiny Act of 1689, 1 W. & M., ch. 4, *reprinted in* WINTHROP, *supra* note 81, at 929. In 1718, Parliament enacted the British Articles of War. *See* WINTHROP, *supra* note 81, at 20. The 1765 version of these articles, which were in force at the time of the American Revolution, provided:

Whenever any officer or soldier shall be accused of a capital crime, or of having used violence, or committed any offence against the persons or property of our subjects, . . . the commanding officer and officers of every regiment, troop, or party, to which the person or persons so accused shall belong, are hereby required, . . . to deliver over such accused person or persons to the civil magistrate; and likewise to be aiding and assisting to the officers of justice, in apprehending and securing the person or persons so accused, in order to bring them to a trial.

British Articles of War of 1765, § XI, art. I, *reprinted in* WINTHROP, *supra* note 81, at 937.

183. *See* Act of Apr. 10, 1806, ch. 20, 2 Stat. 359.

184. *See* WINTHROP, *supra* note 81, at 48.

185. *See* Articles of War of 1806, *reprinted in* WINTHROP, *supra* note 81, at 976.

186. *See* Act of Mar. 3, 1863, ch. 75, § 30, 12 Stat. 731, 736.

187. *See* Act of Aug. 29, 1916, ch. 418, sec. 3, § 1342, 39 Stat. 619, 650.

188. *See* Articles of War of 1916, *reprinted in* MANUAL FOR COURTS-MARTIAL, UNITED STATES, app. 1, at 305 (1917).

1987, the Supreme Court allowed military jurisdiction to encompass any offense that is based on the accused's status as a service member.<sup>189</sup>

Citing *Milligan* and *Quirin* today for the proposition that the Sixth Amendment right to trial by jury does not apply to a military accused ignores a vast difference in the structure of military justice.<sup>190</sup> Then, courts-martial were specialized, limited-jurisdiction tribunals. Now, in substance, they are hardly distinguishable from federal district courts. Yet, the scope of the important Sixth Amendment right to trial by jury remains frozen in time.

Article 25 operates to deny the American service member the right to trial by a jury impartially selected from a fair cross-section of the community. The article violates the charter of the United States government. Courts continue to misapprehend the text and context of that charter, and they ignore the incorrect and inapposite analysis of that charter by apparently controlling decisions. They ignore the development of that charter and the coincident development of military criminal jurisprudence under that charter. If the mere constitutional argument does not convince the courts that Article 25 must go, perhaps the real and perceived practical effects of the violation will.

### III. The Practical Problem with Military Jury Selection: Reality and Appearance of Unlawful Command Influence

The COMA described unlawful command influence as "the mortal enemy of military justice."<sup>191</sup> Unfortunately, in the area of jury selection, unlawful command influence, real and perceived, is alive and well. Faced with it squarely in individual cases, courts will fashion a remedy. However, the decisive rhetoric is accompanied by indecisive and inconsistent action. Unlawful command influence is more an annoying nuisance than a "mortal enemy" in the area of member selection.

Unlawful command influence that affects the fairness and impartiality of the court-martial membership manifests itself in two general categories:

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189. See *Solorio v. United States*, 483 U.S. 435 (1987).

190. See Remcho, *supra* note 63, at 205 ("[E]ven . . . accept[ing] the theory. . . in *Quirin* that right to trial by jury was 'frozen at common law,' the right. . . could only be denied persons accused of 'military' crimes, since at common law non-military offenses were usually tried by civilian jury.").

191. *United States v. Thomas*, 22 M.J. 388, 393-94 (C.M.A. 1986).

ries. First, the convening authority may select, or his subordinates may nominate, particular members to affect the results of the court-martial. This practice is known as “court stacking.” Second, the convening authority, or a subordinate who is cloaked with “the mantle of command authority,”<sup>192</sup> may exercise unwarranted control over current or future panels to achieve particular results. This involves the use of influence. This part of the article examines these two categories of the current system’s practical problem of command influence.

#### A. “Court-Stacking”

The current method of member selection presents two broad “court-stacking” problems. First, the member screening, nomination, selection, and replacement processes involve numerous lesser actors than the convening authority. Second, the courts have left the standards and definitions of the Article 25 criteria to the individual preferences of convening authorities. These problems multiply the potential for abuse, decrease the consistency of results, and add significantly to needless litigation.

##### *1. The Involvement of Too Many Subordinates*

Article 25 apparently contemplates staff assistance for the convening authority in the selection of members.<sup>193</sup> This can lead to problems, even if the convening authority is unaware of subordinate abuse *and* there is no apparent prejudice to the accused.

##### *a. At the Trial Counsel Level*

In *United States v. Hilow*,<sup>194</sup> a division deputy adjutant general selected nominees for court-martial panels who he believed to be “commanders and supporters of a command policy of hard discipline.”<sup>195</sup> Three levels of command approved the deputy adjutant general’s list before it was submitted, along with other lists, to the convening authority. The convening authority was unaware of the “stacking” attempt, and he followed

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192. *United States v. Stombaugh*, 40 M.J. 208, 211 (C.M.A. 1994).

193. *See supra* note 8. *See also* *United States v. Kemp*, 46 C.M.R. 152, 155 (C.M.A. 1973).

194. 32 M.J. 439 (C.M.A. 1991).

the Article 25 criteria in selecting six of the members from this tainted nomination.<sup>196</sup> Apparently, the accused was also unaware of the stacking, but he elected to be tried by military judge alone after determining that the panel was a "severe" one.<sup>197</sup>

The COMA believed that the sequence of events from preferral through election of forum "established a prima facie case of forbearance or 'nexus'" between the taint and the forum election decision.<sup>198</sup> The court ordered a new hearing on sentence.<sup>199</sup> "[S]election of court members to secure a result in accordance with command policy [is] . . . a well recognized form of unlawful command influence" in violation of Article 37(a).<sup>200</sup>

The court also found a violation of Article 25(d).

The import of this provision is that the convening authority must personally select members of a court-martial whom he believes will be experienced, impartial, and fair in fulfilling their adjudi-

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195. *Id.* at 441. The deputy adjutant general (an Army captain) claimed that he was acting at the direction of the staff judge advocate's office. A Dubai hearing found no evidence to support this claim, but determined that the deputy adjutant general did select personnel for nomination whom he believed fit this criteria. *Id.* at 440-41. *See* United States v. Dubay, 37 C.M.R. 411 (C.M.A. 1967).

196. The lower court believed that the unlawful influence of this staff subordinate was attenuated by the convening authority's ignorance and proper application of the Article 25 criteria. *See* United States v. Hilow, 29 M.J. 641, 643-44 (A.C.M.R. 1989).

197. *See id.* at 655 n.13.

198. *Hilow*, 32 M.J. at 443. Judge Cox wrote:

A traveler in a strange land is seeking a safe highway to his destination. He comes to a fork in the road, and he must make a choice. Unknown to him, one road is secure and will lead him unscathed to his journey's end. The other road winds through the Valley of Doom, an evil empire inhabited by thieves, charlatans, and scofflaws, where no man can venture safely. Fortunately for the traveler, he selects the secure path and arrives safely at his destination. Like the traveler, appellant faced a choice—trial by military judge alone or trial by members. Unknown to appellant, the member option was tainted; the judge-alone option was not. Fortunately, he chose judge-alone and got a fair trial.

*Id.* at 444 (Cox, J., dissenting in part). Judge Cox would have affirmed on harmless error grounds.

199. *Id.* at 443.

200. *Id.* at 441 (citations omitted).

catory responsibilities . . . . Moreover, to intelligently make his selections, a convening authority must be fully informed of any attempts to “stack” the court-martial panel or any other matters which may cast doubt on the fairness of the proceedings.<sup>201</sup>

The court was clearly concerned with public perception as well.

The right to trial by fair and impartial members or a professional military judge is the cornerstone of the military justice system. Denial of a full and fair opportunity to exercise this right creates an appearance of injustice which permeates the remainder of the court-martial. When such a perception is fostered or perpetuated by military authorities through ignorance or deceit, it substantially undermines the public’s confidence in the integrity of the court-martial proceedings.<sup>202</sup>

*Hilow* epitomizes the problem of widespread potential for abuse in the member selection process. With so many individuals and levels of command involved, how will the convening authority ever be “fully

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201. *Id.* at 441-42. Interestingly, the court adds the factors of “fair and impartial” to the “experience” factor, which might logically be said to include the other explicit Article 25 factors.

202. *Id.* at 442-43 (citations omitted).

informed," or even aware, if anyone in the nomination or selection process really wants to "stack" the panel?<sup>203</sup>

In *United States v. Smith*,<sup>204</sup> the COMA discovered a remarkable system of nominating members for courts-martial at Fort Ord, California. The convening authority had previously detailed potential members to one of several standing panels and a list of alternates.<sup>205</sup> The staff judge advocate's office tasked a specialist-five<sup>206</sup> legal clerk to determine, for individual courts-martial, the availability of these primary and alternate members.<sup>207</sup> Apparently, if trials involved crimes committed by soldiers of one race against a different race, the panel was to reflect racial diversity. If the crime involved rape or sexual misconduct, at least two women were to be detailed to the panel.<sup>208</sup> If such guidelines were not problematic

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203. The *Hilow* court did not demand complete integrity of the process. The court noted that "[t]his is not a case where the tainted candidates were not detailed to appellant's court-martial or where appellant, being aware of the command subordinate's manipulation, still chose trial by members." *Id.* at 442. The Army Court of Military Review availed itself of this language in *United States v. Redman*, in which "unusual results" from the standing court-martial panel had caused the convening authority to choose a new one. 33 M.J. 679, 681 (A.C.M.R. 1991). Specifically, "we were going through the court-martial process and we were winding up with Article 15 punishments." *Id.* n.4. Following a subsequent trial in which the military judge found the appearance of impropriety, the convening authority re-appointed the original panel, and the accused withdrew his pending command influence motion and agreed to trial by members. *See id.* at 681-82. Distinguishing *Redman* from *Hilow*, the Army court noted that Redman had waived the unlawful command influence by knowingly accepting trial by members. *Id.* The court found that Articles 25 and 37 had been violated, but it affirmed the findings and sentence. *Id.* at 683. The *Redman* court found that the original panel of members was unaware of the convening authority's dissatisfaction with them. *Id.*

204. 27 M.J. 242 (C.M.A. 1988).

205. *Id.* at 244.

206. Referred to as a "spec5," this specialist rank, which no longer exists, was equivalent to sergeant in pay grade E-5.

207. *Smith*, 27 M.J. at 243-44.

208. *Id.* The specialist's supervisors averred that this practice was not policy, but the senior trial counsel was less than convincing:

Although there was no established policy, we thought it was a good idea to have females on sex cases in order to avoid any idea of exclusion. I never set this policy. However, if there was a policy, I thought it made for a broad cross section of the community. Female members made for a better representative sample especially in sex cases due to the sexual issues.



enough on their own, the prosecutors apparently promulgated them. The specialist indicated that, by the time the *Smith* case came to trial, “the selection of court members had become a ‘game’ for the trial counsel.”<sup>209</sup> When the specialist could not find two available females for the *Smith* case (which alleged indecent assault by a male officer on a female officer), she spoke first with her direct supervisor. She also spoke with the chief of the criminal law division. Both advised her on procedures for obtaining the names of female members.<sup>210</sup> When this failed, she contacted a trial counsel, who, understanding the nature of this case, “thought female members would be ‘a nice touch’”<sup>211</sup> and provided the names of three women from his command.<sup>212</sup> When the convening authority reviewed the nominations for this panel, which included some original and some alternate panel members and two of the three women nominated by the trial counsel, he applied an ad hoc mixture of Article 25 criteria and practical considerations in choosing the panel.<sup>213</sup> Apparently unaware of the influence of a prosecutor in this case, the convening authority selected the two female military police officers who had been nominated. He candidly admitted,

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209. *Id.* at 245.

210. *Id.*

211. *Id.* at 247.

212. *Id.* at 245. According to the trial counsel:

All three of these women were military police, and I referred to them as “hardcore.” As a trial counsel, you want court members who are “hardcore.” However, I thought that any of these women would be intelligent and fair members who would acquit the defendant if the evidence was not there.

*Id.* at 247.

213. *Id.* The convening authority stated:

My philosophy regarding selection of court panels involves striking several balances. I look at age because I believe that it is associated with rank and experience. I look for a spread of units on the panel to include division units, non-division units, and tenant activities. I look at the types of jobs and positions of individuals in an effort to have a mix of court members with command or staff experience. I also look for some female representation on the panel.

*Id.*

however, that “[i]n sex cases . . . I have a predilection toward insuring [sic] that females sit on the court.”<sup>214</sup>

The COMA set aside the findings and the sentence, determining that “trial counsel at Fort Ord were not adequately insulated from the process of selecting court-martial members.”<sup>215</sup> The court demonstrated appreciation for public perception in its carefully explained, overly deferential rationale.

Trial counsel in a court-martial is an advocate, who in his representation of the Government is *usually* seeking a conviction. The members of a court-martial—like the members of a civilian jury—are supposed to be fair and impartial. If a prosecutor is involved in selecting the members, it *seems likely that*, due to his institutional bias, he will want to have a certain type of member. Moreover, to the extent that the prosecutor participates in this selection process, it is inevitable that the public will *suspect* that the membership mirrors his preference.<sup>216</sup>

The courts have sought to exclude trial counsel from the member selection process, but not from conducting “ministerial duties” associated with court-martial procedure. Unfortunately, these allowed duties continue, if subtly, his influence in the member selection process. In *United*

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214. *Id.*

215. *Id.* at 250.

216. *Id.* at 251 (emphasis added). The Air Force Court of Criminal Appeals ignored the public relations aspects of its decision in *United States v. Stokes*. 8 M.J. 694 (A.F.C.M.R. 1979). In *Stokes*, a sergeant apparently “prepared the list” of enlisted personnel who were to be added to the court-martial panel pursuant to the accused’s request. *Id.* at 695. The sergeant had joked with the senior enlisted advisor who provided the names that he wanted “the toughest NCOs that he could find.” *Id.* The same sergeant, again “jokingly,” told a defense counsel after the trial “that it would be unwise to request enlisted members for future cases because he was choosing the prospective members.” *Id.* at 696. Finding that all of this banter had been given and taken in jest, the court could adduce no evidence that improper criteria were used to select the panel. *Id.* In *United States v. McCall*, the court-martial was called to order, and the trial counsel indicated that the members who were present were not the members whose names appeared on the convening order. 26 M.J. 804 (A.C.M.R. 1988). He further volunteered that a replacement order with the correct names would be forthcoming. *Id.* at 805. The court found that the convening authority had underscored the names on a nomination list of members whom he desired to use as replacements and that two of the names actually appearing on the replacement order were not so marked. *Id.* The court determined that someone in the convening authority’s criminal law center had chosen two of the replacement members independently and had placed their names on the replacement order. *Id.* at 806.

*States v. Marsh*,<sup>217</sup> the COMA recognized that trial counsel may properly advise members of scheduled trial dates. The court found no difference between that duty and reporting to the convening authority on the availability of potential members.<sup>218</sup> Both encourage pretrial contact between prosecutor and juror. The latter also creates an opportunity for the prosecutor to help a member decide or to decide himself that a possibly unfavorable member is unavailable. The *Marsh* court went even further, noting that a chief of a criminal law division is not per se barred from recommending specific members.<sup>219</sup>

Some abuse might be expected where control of the process has deteriorated to the *Smith* level. Unfortunately, even staff judge advocates, who should certainly appreciate the pitfalls, often improperly affect member selection.

#### *b. At the Staff Judge Advocate Level*

In *United States v. McClain*,<sup>220</sup> the staff judge advocate recommended only senior officers and non-commissioned officers for court-martial panel selection. He specifically intended to avoid lighter sentences, which he perceived to be the result of junior officer and enlisted participation.<sup>221</sup> The COMA found that this violated Article 25 and then pointed out various subsidiary problems with this selection procedure.

First, it created an appearance that the Government was seeking to “pack” the court-martial against [the] appellant. This appearance was enhanced by the circumstance that not only were the

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217. 21 M.J. 445 (C.M.A. 1986).

218. *Id.* at 447-48.

219. *Id.* at 448. In *United States v. Abney*, nominations for court-martial panel members were “compiled and submitted” to the convening authority by a civilian attorney who worked in the military justice section of the staff judge advocate’s office. No. ACM 30700, 1995 WL 329430, at \*1 (A.F. Ct. Crim. App. May 17, 1995) (per curiam). Rejecting a claim that the convening authority “rubber-stamped” this employee’s pro-prosecution selections, the court found that he had “assembled the nominees using Article 25 criteria, and not because of a perceived pro-prosecution bias.” *Id.* But see *United States v. Beard*, 15 M.J. 768, 772 (A.F.C.M.R. 1983) (finding that recommendations by the assistant trial counsel/military justice chief on court membership were reversible error); *United States v. Crumb*, 10 M.J. 520 (A.C.M.R. 1980) (holding that the chief trial counsel may not replace court members).

220. 22 M.J. 124 (C.M.A. 1986).

221. *Id.* at 130.

senior enlisted members appointed to the court but also the junior officer members were excused. Second, this selection deprived enlisted members in grades E-4 through E-6 of the opportunity to obtain experience as court-martial members. Third, it indicated a lack of confidence by the convening authority and his staff judge advocate in the ability of junior officers and enlisted members to adjudge a sentence that would be fair to both the accused and the Government.<sup>222</sup>

The Air Force Court of Criminal Appeals recently retreated from the spirit, if not the letter, of *McClain*. In *United States v. Upshaw*,<sup>223</sup> the staff judge advocate, through honest mistake, excluded from the nomination list all pay grades below E-7.<sup>224</sup> The court found the mistake insufficient to overcome the presumption of legality, regularity, and good faith that attaches to the member selection process.<sup>225</sup> This decision completes a rather absurd equation. If the accused suffers no prejudice, though the government intended as much (*Hilow*), he gets relief. If the accused does suffer prejudice, but the government did not mean it (*Upshaw*) he does not.

The year before *McClain*, in *United States v. Autrey*,<sup>226</sup> the convening authority deliberately excluded company grade officers from the court-martial panel of an accused first lieutenant.<sup>227</sup> The staff judge advocate forwarded to the convening authority a list of nominated field grade officers and his pretrial advice. "Company grade officers are excluded from the

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222. *Id.* at 131. In *United States v. Greene*, the chief of military justice ensured, in accordance with a policy memorandum published by the staff judge advocate, that only colonels and lieutenant colonels were nominated for court-martial panel consideration. 43 C.M.R. 72, 77 (C.M.A. 1970). Upon learning of this policy, the military judge ordered the trial counsel to inform the convening authority that he is not bound to appoint any particular ranks, but that he must consider all ranks. The convening authority responded that he had reviewed the current panel composition and was comfortable with his selections under the criteria of Article 25. *Id.* at 75-76. The accused elected trial by military judge alone, noting his displeasure with the top-heavy panel. *Id.* at 76. The COMA reversed the Air Force Court of Military Review's determination that "selection of members solely from a list of senior officers is proper." *Id.* See *United States v. Cook*, 18 C.M.R. 715, 717 (A.F.B.R. 1955) (finding a violation of Article 37 where the staff judge advocate had first drafted the member appointment memorandum and then sought assignment as the trial counsel).

223. No. ACM 32255, 1997 WL 165680, at \*1 (A.F. Ct. Crim. App. Apr. 4, 1997) (per curiam).

224. *Id.*

225. *Id.* (citing *United States v. Carman*, 19 M.J. 932, 936 (A.C.M.R. 1985)).

226. 20 M.J. 912 (A.C.M.R. 1985).

227. *Id.* at 913.

list and recommend that no company grade officers be detailed as [First Lieutenant] Autrey is well-known among them on this installation.”<sup>228</sup> The staff judge advocate testified on a motion for appropriate relief that he had two reasons for his recommendation. First, among the 220-250 captains on the installation, “a tremendously large portion thereof” were ineligible because of duty assignment, and “a good number” of the remainder knew each other and would talk among themselves about this case.<sup>229</sup> Second, because of the severity of the charges (larceny, filing a false claim, and false statement), “the accused should have the benefit of having the most mature, sound, and competent court members to consider the facts and make a **determination**.”<sup>230</sup>

Setting aside the findings and sentence, the Army Court of Military Review was understandably suspicious of both asserted reasons.

It strains credulity to imagine that the appellant might have been personally acquainted with each of the approximate 100 eligible captains to the extent that they would be unable to sit as members of his court-martial. Even were he to be such a social butterfly . . . this is a matter properly addressed during voir dire proceedings.

. . . [T]he idea that those in the grade of captain may be excluded from court-martial duty on the theory that they do not meet the statutory criteria as set out in Article 25(d)(2) has no basis in fact or logic.<sup>231</sup>

“Court-stacking,” real or perceived, accomplished directly by the convening authority or indirectly by a subordinate, harms the individual case and the idea of justice in the military. Participation by a large number of people virtually invites improper influence before the convening authority even has a chance to apply Article 25 criteria, and it certainly invites public scrutiny.<sup>232</sup> When the convening authority does apply the criteria,

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228. *Id.*

229. *Id.* at 914.

230. *Id.*

231. *Id.* at 916-17.

232. See *infra* notes 331,342-343,347-351 and accompanying text.

she has such unguided discretion that almost any aspect of her decision can be, and is, challenged.

## 2. Lack of Objective Standard or Definition to the Article 25 Criteria

The Article 25 criteria for choosing members are inherently subjective. The terms themselves lack definition, and the UCMJ provides no guidance on the method of their application. Because the convening authority provides the definition and the method of application, the selection process reflects his individual preferences. Convening authorities draw judicial scrutiny for choosing predominantly senior personnel or commanders for court-martial panels. Likewise, the courts will examine convening authorities who essentially abandon their responsibility to select the members affirmatively and personally. Unfortunately, the gamut of allowable individual definition and application is wide.

### a. Choosing Senior Personnel or Commanders

Article 25 does not include rank, seniority, or command among its listed criteria. The courts, however, will support the appropriate characterization of these qualities under the listed Article 25 criteria. In *United States v. Crawford*,<sup>233</sup> the COMA held that the convening authority may not deliberately and systematically exclude the lower enlisted ranks when selecting a court-martial panel.<sup>234</sup> The court noted, however, that Article 25, by its terms, will result in mostly senior panels.<sup>235</sup> In *United States v. Cunningham*,<sup>236</sup> the Army Court of Military Review sanctioned the intentional inclusion of commanders, noting that the attributes of command are entirely consistent with the qualifications of Article 25.<sup>237</sup> In *United States v. Smith*,<sup>238</sup> the same court found that a convening authority's letter directing his staff judge advocate to provide specific ranks for the panel<sup>239</sup> was an impermissible selection process based on grade alone.<sup>240</sup> The court all but acknowledged that the convening authority could have legally selected

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233. 35 C.M.R. 3 (C.M.A. 1964).

234. *Id.* at 10. The court found no systematic exclusion in the failure of the Army to include soldiers below pay grade E-4 on any court-martial panels between 1959 and 1963. *Id.* See *United States v. James*, 24 M.J. 894, 896 (A.C.M.R. 1987) (finding no systematic exclusion where no lieutenants or warrant officers had served on panels in the past year). But see *United States v. Daigle*, 1 M.J. 139, 141 (C.M.A. 1975) (disallowing the intentional exclusion of all lieutenants and warrant officers from consideration for court-martial panels).

the same members. He simply should have articulated as his basis the correspondence of seniority and the Article 25 criteria.<sup>241</sup>

*United States v. Lynch*<sup>242</sup> involved negligent hazarding of a vessel. The Coast Guard Court of Military Review approved the convening authority's decision to appoint as members only officers with "sea-going"

235. See *Crawford*, 35 C.M.R. at 8-12. In *United States v. Carman*, the convening authority selected five lieutenant colonels and one major for a special court-martial. 19 M.J. 932,935 (A.C.M.R. 1985). The court expressed concern that prejudice results when the convening authority appears to select prosecution-favorable members, but affirmed anyway, noting that the selection of senior officers was consistent with Article 25. *Id.*

In today's Army, senior commissioned and noncommissioned officers, as a class, are older, better educated, more experienced, and more thoroughly trained than their subordinates. The military continuously commits substantial resources to achieve this. Additionally, those officers selected for highly competitive command positions in the Army have been chosen on the "best qualified" basis by virtue of many significant attributes, including integrity, emotional stability, mature judgment, attention to detail, a high level of competence, demonstrated ability, firm commitment to the concept of professional excellence, and the potential to lead soldiers, especially in combat. These leadership qualities are totally compatible with the UCMJ's statutory requirements for selection as a court member.

*Id.* See *United States v. Roland*, No. ACM 32485, 1997 WL 517667, at \*2 (A.F. Ct. Crim. App. Aug. 11, 1997) (asserting that "[i]t is not improper for the convening authority to look to officers or enlisted members of senior rank because they are more likely to be best qualified by reason of age, education, training, experience, length of service, and judicial temperament"); *United States v. McLaughlin*, 27 M.J. 685, 686-87 (A.C.M.R. 1988) (finding, no violation of Article 25 with the convening authority's written systematic policy of replacing only the most junior officer members when enlisted members were requested).

236. 21 M.J. 585 (A.C.M.R. 1985).

237. *Id.* at 587. See *United States v. White*, No. ACM S29207, 1997 WL 38202, at \*3 (A.F. Ct. Crim. App. Jan. 8, 1997) (finding nothing improper with a nine-member panel that contained seven commanders after the convening authority had expressed, in a recent letter, a concern with the apparent lack of commanders and senior enlisted personnel available for court-martial service).

238. 37 M.J. 773 (A.C.M.R. 1993).

239. The convening authority's handwritten notes said, "get an E8 from 1st Brigade, get an E7 from DISCOM [Division Support Command], get an E8 from Divarty [Division Artillery], and get an E7 from Victory Brigade." *Id.* at 775.

240. *Id.* at 776.

241. See *id.*

242. 35 M.J. 579 (C.G.C.M.R. 1992), *rev'd on other grounds*, 39 M.J. 233 (C.M.A. 1994).

experience.<sup>243</sup> The court found that this was permissible consideration and selection by the convening authority under the "experience" criterion of Article 25.<sup>244</sup> Essentially, the appellate court sanctioned a panel of experts, which has traditionally been viewed as antithetical to the concept of trial by jury.<sup>245</sup>

Article 25 requires a balance by the convening authority. On one hand, he may not supplement the statutory criteria with his personal criteria. On the other hand, he must personally select the members. Article 25 encourages litigation of both issues; however, the courts forgive convening authorities who ignore the Article 25 criteria more readily than they do those who manipulate them.

*b. Failing to Personally Select*

The COMA sanctioned a near total abandonment of Article 25 criteria in *United States v. Yager*.<sup>246</sup> There, the convening authority used random selection from all ranks above private first class.<sup>247</sup> The court upheld the conviction and implicitly approved both the failure to choose members

243. *Id.* at 587-88.

244. *Id.*

245. See JON M. VAN DYKE, *JURY SELECTION PROCEDURES, OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS* xii (1977) ("The jury—a **group** of ordinary people assembled for a limited period to decide a given case—is considered the fairest instrument of justice because of a belief that the danger of bias is even greater when 'experts' are used."). The English author G. K. Chesterton mused:

When it wants a library catalogued, or the solar system discovered, or any trifle of that kind, [society] uses **up** its specialists. But when it wishes anything done which is really serious, it collects twelve of the ordinary men standing round. The same thing was done, if I remember right, by the founder of Christianity.

G. K. CHESTERTON, *TREMENDOUS TRIFLES* 55 (12th ed. 1930).

246. 7M.J. 171 (C.M.A. 1979).

247. *Id.*



according to the “best qualified” standard of Article 25 and the “deliberate and systematic” exclusion of the two lowest enlisted pay grades.<sup>248</sup>

In *United States v. Allgood*,<sup>249</sup> the convening authority at Fort Dix referred charges to a court-martial that had been convened by a previous commander of a unit that was no longer in existence.<sup>250</sup> After the trial, the convening authority asserted that, before he referred the charges, he had “adopted” the members who had been selected by the previous commander.<sup>251</sup> The Court of Appeals for the Armed Forces (CAAF) recognized “that ‘adoption,’ at least in the Army context, is generally understood to include personal evaluation and selection of court-martial members as required by Article 25.”<sup>252</sup> However, the CAAF accepted the convening authority’s assertion. Setting aside the Army Court of Military Review’s findings,<sup>253</sup> the CAAF dismissed the fact that most of the detailed members had transferred from Fort Dix before referral.<sup>254</sup>

Several cases concerning the convening authority’s “adoption” of a panel that had been selected by a predecessor in command turn on a presumption of propriety. “Absent any evidence to the contrary, [the court] presume[s] regularity in the convening process, including knowledge on the part of the convening authority as to the identity of the members of the appellant’s court-martial.”<sup>255</sup>

Clearly, the convening authority wields wide discretion to determine what fits the listed criteria of Article 25. Apparently, the convening authority may sometimes disregard the criteria altogether. This individu-

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248. See *id.* at 173. See *United States v. Pearl*, 2 M.J. 1269, 1271 (A.C.M.R. 1976) (approving an “experimental program for the selection of court members on a random basis”).

249. 41 M.J. 492 (1995).

250. *Id.* at 493. The convening authority assumed command of the United States Army Training Center and Fort Dix in September 1992. On 1 October 1992, the Training Center was redesignated as United States Army Garrison, Fort Dix. On 30 October 1992, the convening authority referred this case to a general court-martial that was convened by, and with panel members selected by, the former commander of the United States Army Training Center and Fort Dix. *Id.*

251. *Id.* at 496. The accused was tried on 4 November 1992. *Id.* at 493. On 11 December 1992, the convening authority issued a memorandum for record in which he indicated that, prior to referral of this case, he adopted the panel selections of his predecessor. *Id.* at 496.

252. *Id.*

253. *Id.*

254. See *id.* at 498 (Cox, J., dissenting). See also *United States v. Allgood*, 37 M.J. 960, 962 n.2 (A.C.M.R. 1993).

alized process invites real and perceived abuse. It also decreases the consistency of justice in the system. Finally, it encourages attack, at trial and on appeal, on the convening authority's member selection decision.<sup>256</sup>

In *United States v. Brown*,<sup>257</sup> the Air Force Court of Military Review lamented:

Literally hundreds of pages of record were consumed as appellant's trial defense counsel launched a no-holds-barred attack on the selection process for the members of the court-martial. At one time or another the special court-martial convening authority's staff judge advocate, the special court-martial convening authority himself, the general court-martial convening authority, and his SJA, were called to testify on the selection process. The first salvo scored a direct hit, as the special court-martial convening authority, through his SJA, had effectively ruled out consideration of enlisted members below the grade of E-5 . . . . Appellant's efforts at the second go-round focused on "stacking" the court with senior members. It was appellant's position then that the convening authority's a priori decision that he wanted senior representation on courts-martial was prohibited . . . . He was particularly concerned that all of the lieutenant colonels and colonels on Vandenberg [Air Force Base] were part of the "pool" which the base routinely forwarded to the appropriate convening authority for consideration.

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255. *United States v. Rader*, No. NMCM 97 00242, 1997 WL 6513 16, at \*1 (N.M. Ct. Crim. App. Sept. 26, 1997) (per curiam). *Accord* *United States v. Vargas*, 47 M.J. 552 (N.M. Ct. Crim. App. 1997). When there is evidence to the contrary, relief may be forthcoming, even before reaching the appellate level. In a recent case, defense counsel moved for appropriate relief to dismiss the entire panel of members on the basis of court-stacking. Counsel alleged that the convening authority selected members based solely on their propensity to adjudge a harsh sentence. When the convening authority testified on the motion, the military judge asked him whether he had used age, education, training, experience, length of service, and judicial temperament as criteria in selecting these members. The convening authority responded candidly that he would never dare to influence the jury selection process by considering these attributes. In fact, the convening authority testified that he had no idea who these enlisted members were; he was careful to ensure that his sergeant major chose all of the enlisted members. The defense prevailed on the motion. Interview with Major John R. Ewers, Military Judge, Sierra Judicial Circuit, Navy-Marine Corps Trial Judiciary, Camp Pendleton, Cal., in Charlottesville, Va. (Nov. 18, 1997).

256. In *United States v. Yager*, the defense applauded the convening authority's random selection scheme, but challenged it nonetheless because it violated the language of Article 25. 7M.J. 171, 171-72 (C.M.A. 1979).

257. *No. ACM 32225*, 1997 WL 101934, at \*I (A.F. Ct. Crim. App. Feb. 20, 1997).

... In the end, appellant had a wide range of grade representation: 0-6, 0-5, 0-4, 0-3, E-9, E-7, E-5, and E-4. There was no indication that any grade was impermissibly excluded from consideration, nor was there any evidence of an intent to “stack” the court-martial panels.<sup>258</sup>

In defending the proposed 1968 Federal Jury Selection and Service Act<sup>259</sup> before Congress, the head of the federal judiciary’s Committee on the Operation of the Jury System, Judge Irving Kaufman, stated:

The judges of my Committee considered this matter [of subjective criteria as juror qualifications] at length. We came to these conclusions: . . . long experience with subjective requirements such as “intelligence” and “common sense” has demonstrated beyond any doubt that these vague terms provide a fertile ground for discrimination and arbitrariness, even when the jury officials act in good faith.

...

The end result of subjective tests is not to secure more intelligent jurors, but more homogeneous jurors. If this is sought in the American jury, then it will become very much like the English jury — predominantly middle-aged, middle-class, and middle-minded.<sup>260</sup>

Surviving “court-stacking” allegations is but half the game under Article 25. A thornier and more sinister problem plagues the current system. The convening authority may intentionally or unwittingly exert influence over the otherwise independent judgment of his present or future panel members.

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258. *Id.* at \*5-6.

259. *See supra* notes 149-153 and accompanying text.

260. *Federal Jury Selection: Hearings on S. 1319 Before the Subcomm. on Improvements in Judicial Machinery & the Senate Comm. on the Judiciary*, 90th Cong. 49, 255 (1967) [hereinafter *Hearings on S. 1319*] (statement of Judge Irving R. Kaufman, U.S. Court of Appeals for the Second Circuit, and Head, Committee on the Operation of the Jury System).

## B. Influence

Public outcry at perceived widespread abuses in the military justice system during World War II<sup>261</sup> led first to the Elston Act in 1948<sup>262</sup> and then to the 1950 enactment of the UCMJ.<sup>263</sup> The Elston Act added to the Articles of War a prohibition against convening authorities and commanders reprimanding, coercing, or unlawfully influencing any court-martial member in reaching the findings or sentence in any case.<sup>264</sup> Article 37 of the UCMJ, which was modeled on this provision, broadly prohibits convening authorities or commanders from censuring court-martial members, judges, or counsel.<sup>265</sup> The article further prohibits coercion and unauthorized influence of court-martial members by *any* member of the armed

261. During World War II, approximately two million courts-martial were convened. See Walter T. Cox III, *The Army, the Courts, and the Constitution: The Evolution of Military Justice*, 118 MIL. L. REV. 1, 11 (1987). Numerous examples of harsh punishments and extremely abbreviated due process were reported to Congress. See WILLIAM T. GENEROUS, JR., *SWORDS AND SCALES* 14-21 (1973). Congress was deluged by demands for reform of the court-martial system from organizations such as the American Bar Association and the American Legion. See Cox, *supra*, at 12.

262. Elston Act, 62 Stat. 604, 627-44 (1948). The Elston Act contains the 1948 amendments to the Articles of War.

263. See Earnest L. Langley, Note, *Military Justice and the Constitution—Improvements Offered by the New Uniform Code of Military Justice*, 29 TEX. L. REV. 651 (1951) (noting that the perceived abuses centered around unlawful command influence).

264. See Articles of War of 1948, art. 88, *reprinted in* MANUAL FOR COURTS-MARTIAL, UNITED STATES, app. 1, at 273, 296 (1949) [hereinafter 1949 MANUAL].

265. Article 37(a) provides:

No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions in the conduct of the proceedings.

forces.<sup>266</sup> Finally, the article proscribes evaluation reports based on duty performance as a court-martial member.<sup>267</sup>

### *1. United States v. Youngblood and Recent Coercion*

Convening authorities do not typically censure or reprimand members directly. Instead, a subtler coercion and unauthorized influence infects military justice, as highlighted by a recent case. In *United States v. Youngblood*,<sup>268</sup> several court-martial panel members attended a staff meeting ten days before trial. At the meeting, the convening authority and the staff judge advocate discussed "the state of discipline in the unit and the . . . convening authority's views of 'appropriate' levels of punishment."<sup>269</sup>

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266. Article 37(a) continues:

No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.

*Id.*

267. Article 37(b) provides:

In the preparation of an effectiveness, fitness, or efficiency report, or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced, in grade, or in determining the assignment or transfer of a member of the armed forces or in determining whether a member of the armed forces should be retained on active duty, no person subject to this chapter may, in preparing any such report (1) consider or evaluate the performance of duty of any such member as a member of a court-martial, or (2) give a less favorable rating or evaluation of any member of the armed forces because of the zeal with which such member, as counsel, represented any accused before a court-martial.

*Id.* art. 37(b). See Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335 (adding the language of article 37(b)); Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393 (insulating judges and defense counsel from the actions of convening authorities).

268. 47 M.J. 338 (1997). See Lieutenant Colonel Lawrence J. Morris, "This Better Be Good": *The Courts Continue to Tighten the Burden in Unlawful Command Influence Cases*, ARMY LAW., May 1998, at 49, 60-65 (analyzing *Youngblood* in the context of recent forms of unlawful command influence).

269. *Youngblood*, 47 M.J. at 339.

The staff judge advocate had identified a specific example concerning a former commander within the unit who had “under-reacted” in a case of child abuse.<sup>270</sup> The convening authority then added that his response had been to forward a letter to that commander’s next duty-station; in the letter, the convening authority opined that the former commander “had peaked.”<sup>271</sup> During voir dire, the members expressed varying degrees of confidence in the independence of their individual judgment.<sup>272</sup>

The CAAF set aside the sentence because the trial judge denied challenges for cause against these members.<sup>273</sup> The court found that the members harbored “implied bias.”<sup>274</sup> “Implied bias is reviewed through the eyes of the public.”<sup>275</sup> “The focus ‘is on the perception or appearance of fairness of the military justice system.’”<sup>276</sup> The court acknowledged that this case involved challenges for cause based on unlawful command influence,<sup>277</sup> but avoided that underlying issue altogether by deciding the case on the military judge’s abuse of discretion in denying the challenges.<sup>278</sup>

*Youngblood* is important in two major respects. First, it highlights the continued vitality of unlawful command influence. Not only did the convening authority exert improper influence, his staff judge advocate affirmatively assisted in the endeavor. Whether characterized as “command influence” or “implied bias,” the result here was the same—the sentence was adjudged by a panel of officers who were clearly aware of the threat to their professional futures if they “under-reacted.” In the late seventeenth century case of *William Penn*, the trial court punished the acquitting

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270. *Id.* at 340.

271. *Id.*

272. *Id.* When asked about his concern over the possibility of a similar letter being addressed to his next command, one member stated “that he would do what was right but that the remarks at the staff conference were ‘at a minimum in my subconscious and, you know, parts of it are very clearly in my conscious.’” *Id.* Another member responded that her opinion was her opinion, “[a]lthough it can be somewhat influenced by guidance and information out there . . .” *Id.* A third member stated that he was “definitely” left with the impression that the commander who “under-reacted” would suffer adverse professional consequences. *Id.*

273. *Id.* at 341.

274. *Id.* The accused pleaded guilty; the findings were untainted. *Id.*

275. *Id.* (citing *United States v. Lavender*, 46 M.J. 485, 488 (1997); *United States v. Napoleon*, 46 M.J. 279, 283 (1997)).

276. *Id.* (quoting *United States v. Dale*, 42 M.J. 384, 386 (1995)). See Major Gregory B. Coe, “*Something Old, Something New, Something Borrowed, Something Blue*”: *Recent Developments in Pretrial and Trial Procedure*, ARMY LAW., Apr. 1998, at 44, 74-78 (discussing implied bias).

277. See *Youngblood*, 47 M.J. at 341.

jurors with fines and imprisonment.<sup>279</sup> In principle, the *Youngblood* jurors faced a similar threat. A commander's determination that a member has professionally "peaked" could be the end of a member's livelihood. How is the potential punishment of jurors here different in principle from the potential punishment of jurors by the thirteenth century writ of *attaint*<sup>280</sup> or the sixteenth century *Star Chamber*?<sup>281</sup> Put another way, why did the nation's founding fathers fight the revolutionary war if this right, which

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278. The court relied on Rule for Courts-Martial 912(f)(1)(N). *Id.* See MCM, *supra* note 5, R.C.M. 912(f)(1)(N). Judge Sullivan invited the majority to call this what it was: unlawful command influence. He also focused on public perception.

Plainly speaking, both sides in a court of law are entitled to a panel of fair jurors, jurors who have not had any pressure put on them to be lenient or to be harsh. The only allowable pressure on a juror is the duty to be fair. Whether a juror succumbs to any improper pressure is really not the main point. A jury system must appear fair for it to be recognized as fair.

*Youngblood*, 47 M.J. at 343 (Sullivan, J., concurring in part and dissenting in part) (citations omitted). Judge Sullivan continued, "[a]s Lord Chief Justice Hewart said: A long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done." *Id.* (quoting *The King v. Sussex Justices*, 1 K.B. 256, 259 (1924)).

279. William Penn and William Mead, Quaker activists, were tried in London on charges of unlawful assembly after they conducted a disruptive Quaker meeting. The jury sought to return various verdicts, such as "guilty of speaking," which essentially exonerated the accused. The trial judges disallowed these verdicts. After several sessions of deliberations and findings, the jury found the defendants not guilty. The jurors were fined and imprisoned. *On* a writ of habeas corpus, the appellate court freed the jurors in a historic decision that celebrated the need for jury independence. See VAN DYKE, *supra* note 245, at 5; 1 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 345-46 (A. L. Goodhart & H. G. Hanbury eds., 7th ed. 1956).

The [Penn] decision articulates a principle we now fully accept: that if the jury is to play its intended role as an impartial fact-finder, expressing the community's decision, it must be independent. Otherwise, it is not really the community's voice but the voice of the crown (or state), and *the entire rationale for using a jury is erased.*

VAN DYKE, *supra* note 245, at 5 (emphasis added).

280. The writ of *attaint* appeared in England from 1202 to 1825. It provided for the reversal of a jury's verdict and punishment of the jurors if they reached an untrue or perjurious verdict. See 1 HOLDSWORTH, *supra* note 279, at 337-40.

was fundamental to their cause, was to be abrogated two and a quarter centuries later?<sup>282</sup>

Second, *Youngblood* demonstrates the lack of real commitment to the concept of a "fair and impartial panel."<sup>283</sup> The trial judge abused his discretion. The Air Force Court of Criminal Appeals affirmed the findings and sentence<sup>284</sup> and noted:

We find nothing improper about the commander's meeting, which focused upon the responsibility of commanders for discipline within their unit . . . . We note that the briefings given at the commanders' meeting made no reference to how court-martial members should carry out their responsibilities and no attempt was made to offer guidance on how specific offenses should be disciplined.<sup>285</sup>

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281. The Star Chamber was a panel of English appellate judges who fined and imprisoned trial juries for returning verdicts that were contrary to the wishes of the Crown. See THEODORE F. T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 181-84 (5th ed., Butterworth & Co. Ltd. 1956) (1929).

282. The colonists brought the right to trial by jury with them from England. Their various colonial charters contained specific guarantees in one form or another of the right. See MOORE, *supra* note 132, at 97-100. As the fervor toward independence grew, so did the importance and appreciation of this right. The first session of the American Stamp Act Congress in 1765 declared that "trial by jury is the inherent and invaluable right of every British subject in these colonies." RESOLUTIONS OF THE STAMP ACT CONGRESS para. 8 (Oct. 19, 1765), reprinted in *SOURCES OF OUR LIBERTIES*, *supra* note 69, at 270. In 1774, the First Continental Congress resolved "[t]hat the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage according to the course of that law." DECLARATION AND RESOLVES OF THE FIRST CONTINENTAL CONGRESS para. 6 (Oct. 14, 1774), reprinted in *SOURCES OF OUR LIBERTIES*, *supra* note 69, at 286,288. Indeed, the revolution was claimed to be founded in part on the abridgment "of the accustomed and inestimable privilege of trial by jury, in cases affecting both life and property." DECLARATION OF THE CAUSES AND NECESSITY OF TAKING UP ARMS para. 3 (July 6, 1775), reprinted in *SOURCES OF OUR LIBERTIES*, *supra* note 69, at 295, 296. "[D]epriving us, in many cases, of the benefits of trial by jury" was listed in The Declaration of Independence as one of the reasons for its necessity. THE DECLARATION OF INDEPENDENCE para. 14 (U.S. 1776). Virtually all of the state constitutions that were drafted during and after the Revolutionary War contained specific guarantees of the right to trial by jury. See *supra* note 75.

283. See *supra* notes 168-175 and accompanying text.

284. United States v. *Youngblood*, No. ACM 3 1617, 1996 WL 367389, at \*1 (A.F. Ct. Crim. App. June 24, 1996), *aff'd in part, rev'd in part*, 47 M.J. 338 (1997).

285. *Id.* at \*2.



While a majority on the CAAF rejected the Air Force court's decision and set aside the sentence, the CAAF refused to address the real issue of unlawful command influence.<sup>286</sup>

*Youngblood* illustrates recent unlawful command-level influence and intermediate appellate level failure to address it. Unfortunately, its problems and lessons are anything but recent.

## 2. Older Lessons in Coercion

In *United States v. Reynolds*,<sup>287</sup> the convening authority expressed his dissatisfaction with previous court-martial results at his morning meeting.<sup>288</sup> Specifically, he opined that anyone who was involved with drugs ought to be made "a civilian as soon as possible."<sup>289</sup> Further, he pointed out that circumstances warranting discharge necessarily exist if a commander convenes a court-martial.<sup>290</sup> This meeting took place on the morning of the accused's court-martial for distribution of drugs, and four members of the panel were present at the meeting.<sup>291</sup> The staff judge advocate, who was also at the meeting, interrupted the convening authority's remarks, attempted to rehabilitate the audience, and even testified at a pretrial hearing that morning to outline the discussion.<sup>292</sup> On voir dire, the four members who attended the meeting all agreed that the commander's influence would not affect them.<sup>293</sup> The court affirmed the results in a three-two decision and found that the commander's remarks were inappropriate, but nothing more "than a mere appearance of evil."<sup>294</sup> One dissenting judge noted:

[S]ubstantial doubt existed as to the fairness of the proceedings . . . I cannot say with any degree of certainty that this jury panel

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286. The CAAF *does* recognize the importance of public perception of fairness within the military justice system. *Rather* than examining the evident unlawful command influence, the court based its entire ruling on "implied bias," or how the public would view this panel. See *United States v. Youngblood*, 47 M.J. 338,341-42 (1997).

287. 40 M.J. 198 (C.M.A. 1994).

288. *Id.* at 200.

289. *Id.*

290. *Id.*

291. *Id.* at 199.

292. *Id.* at 199-200.

293. *Id.* at 202.

294. *Id.*

was untainted by command influence. The affirmance of a conviction that may be tainted with command influence would be inconsistent with the very purpose of the creation of this Court by Congress.<sup>295</sup>

The other focused on the appearance of impropriety.

Courts-martial must not only be fair; they must appear to be fair. Appellant's case falls far short on the appearance of fairness . . . . I find defense counsel's failure to challenge the four affected members for cause inexplicable. There is no doubt that they should not have sat as members "in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." While I do not doubt the sincerity or honesty of the members in their disclaimers regarding [the commander's] comments, the conflict between their personal interests and their sworn duty as court members demanded that they be excused in the interests of justice. If counsel would not challenge them, the military judge should have done so *sua sponte* or declared a mistrial.<sup>296</sup>

Judge Cox, who authored the Reynolds majority opinion, also wrote the court's opinion nine years earlier in *United States v. Brice*.<sup>297</sup> In that drug trafficking case, the convening authority ordered, mid-trial, that all members of the command, including panel members, attend an anti-drug lecture delivered by the visiting Commandant of the Marine Corps.<sup>298</sup> During the lecture, the Commandant "stated that drug trafficking was 'intolerable' in the military and such persons should be 'out' of the Marine Corps."<sup>299</sup> As in Reynolds, all of the members assured the court that these remarks would have no influence on their impartiality.<sup>300</sup> The COMA reversed the Navy-Marine Corps Court of Military Review and held that the trial judge should have granted a mistrial upon the court's reconvening. Interestingly, unlike the remarks in the *Reynolds* case, the Commandant's

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295. *Id.* at 204 (Sullivan, C.J., dissenting).

296. *Id.* at 204 (Gierke, J., dissenting) (quoting MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 912(f)(1)(N) (1984) [hereinafter 1984 MANUAL]) (citations omitted).

297. 19 M.J. 170 (C.M.A. 1985).

298. *Id.* at 171.

299. *Id.*

300. *Id.*

lecture did not come from the convening authority. Further, the *Brice* court avoided characterizing these remarks as command influence.

We do not in any way wish to be viewed as condemning the contents of the commandant's remarks since the drug problem in the military demands command attention; nor do we feel that such remarks necessarily constitute illegal command influence. Instead, we base our decision on the confluence of subject and timing, particularly as they affect the minds—however subtly or imperceptibly—of the triers of fact in this particular case.<sup>301</sup>

The difficulty in reconciling *Reynolds* with other cases of this tenor is not necessarily surprising. It does demonstrate the individualized nature of the appellate remedy and the less than full commitment to the eradication of unlawful command influence and the evil of its appearance. More importantly, *Brice*, *Reynolds*, and *Youngblood* are not sporadic anecdotal examples of convening authorities and staff judge advocates exerting improper influence. They are part of a continued pattern, the boundaries of which are unknown beyond those cases that are reviewed by the courts.<sup>302</sup>

#### IV. The Solution: Select Court-Martial Members from Installation-Level Venire Pools

Article 25 is neither constitutional nor fair. Article 25 must go. Its replacement must be an efficient method of impartial panel selection from a fair cross-section of the community. Section A, below, identifies the mechanics of a proposed model for such a method based on a computer

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301. *Id.* at 172 n.3. The court compared the *Brice* facts with those in *United States v. McCann*. *Id.* See *United States v. McCann*, 25 C.M.R. 179 (C.M.A. 1958). During a recess in that case, which concerned charges of drunken operation of a ground control approach facility, panel members attended a lecture on military justice that was delivered by the staff judge advocate. The staff judge advocate characterized certain acts of misconduct as more reprehensible in the military than in the civilian community. He specifically discussed the case of a ground control approach operator who incapacitated himself for duty through use of alcohol. *Id.* at 180. The court set aside the conviction and held that this "'justice' lecture constituted an improper influence upon the court members in regard to a case upon which they were then sitting." *Id.*

302. See Martha H. Bower, *Unlawful Command Influence: Preserving the Delicate Balance*, 28 A.F. L. REV. 65, 70-77 (1988) (providing synopses of cases from the 1950s through the 1980s that illustrate the on-going influence, sometimes subtle, sometimes blatant, of convening authorities over members).

maintained database. Section B defends the model on theoretical and practical grounds. Where particularly relevant, section A provides some of the justification for the model.

## A. Mechanics of the Proposed Model

### 1. *The Venire Pool*

This model for efficient and fair panel selection begins as part of the check-in procedure at a new duty station. Personnel who are reporting to a particular installation, including members of the active reserve, would complete a generic court-martial questionnaire as part of the check-in procedure with the administrative officer of the receiving command. Those who are involved with law enforcement and the military justice process (for example, trial and defense counsel and military justice clerks) would be exempt. The questionnaires would be forwarded to the installation administrative officer (G-1). Each calendar quarter, the G-1 would add all of the new names to the venire pool. The venire pool would be a computer-maintained database. Several commercially available programs allow input, management, and retrieval of data according to fields or categories of information.<sup>303</sup> The venire pool would include the following fields that are related to the actual selection process: name, rank, report date (by calendar quarter—for example, 1/97, 2/97, 3/97, or 4/97), and availability. Other fields that are related to the administration of the process could include home and work telephone numbers and assigned unit.

When the convening authority “refers” charges, he would do so to “a” special or general court-martial. The charge sheet otherwise would be unchanged. No convening order would be necessary. When the defense formally enters forum selection, the installation G-1 would be notified if the accused chose members. The G-1 would then query the database for members. Sorting would be by rank, reporting quarter, availability, and alphabetical order. Personnel who are of equivalent or senior rank to the accused and who have been assigned on station the longest (or residing in

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303. Microsoft, Inc. markets a database program called “Access,” which is currently available in the Microsoft Office Suite that is in use throughout the United States Army and that is intended to be employed by the other services. Other companies that *specialize* in database software include: Bluestream Database Software Corp., Chicago, Ill.; Customized Database Systems, Inc., White Plains, N.Y.; Database Solutions, Lake Arrowhead, Cal.; Database Systems Integrators, Elk Grove, Cal.; and Integrated Database Software, Plymouth, Minn.

the area the longest, if in the reserves) would be at the "top of the list" in alphabetical order. Alphabetization would randomly shuffle all quarterly new arrivals.<sup>304</sup> Disqualification "flags" would operate to bypass the convening authority and investigating officer. The availability field would operate to bypass personnel who are deployed, temporarily assigned elsewhere, or on leave. The viability of this field would depend on close coordination between administrative offices.<sup>305</sup> The G-1 would "detail" the first fourteen people who, together, proportionally represent the rank group structure of the installation.<sup>306</sup> The G-1 would forward their questionnaires to the appropriate staff judge advocate for distribution to the parties. Once detailed, members would be reentered into the venire pool with a new reporting quarter as if they had just arrived on station. They would

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304. When formal schools graduate, particular installations may receive many service members of a distinct military community, all of whom have similar rank, **know** each other, and are destined for service in the same subordinate units.

305. One way to simplify the task of inputting availability data would be to have the database accessible to all administrative offices. Safeguards against tampering and against access to the entire venire so as to determine the order of jurors would have to be employed.

306. The five rank groups would be the service equivalents of: field grade officers, company grade officers, staff noncommissioned officers, noncommissioned officers, and the lowest enlisted ranks. The Supreme Court places no significance on the number twelve, but has established a lower threshold of six. *See Ballew v. Georgia*, 435 U.S. 223 (1978) (striking down a state statute that established five-member juries in misdemeanor trials). The **Ballew** Court relied on a series of studies which suggested, *inter alia*, that reducing the jury size from six to five might provide an inadequate cross-section of the community and would impair effective group deliberation. *See id.* at 231-33 nn.10-11. *See also* *United States v. Corl*, 6 M.J. 914 (N.M.C.M.R. 1979), *aff'd*, 8 M.J. 47 (C.M.A. 1979) (finding **Ballew** concerns inapposite to military jury selection under Article 25 and therefore rejecting equal protection arguments that military panels of less than six are unconstitutional). *Accord* *United States v. Wolff*, 5 M.J. 923 (N.M.C.M.R. 1978), *petition denied*, 6 M.J. 305 (C.M.A. 1979); *United States v. Montgomery*, 5 M.J. 832 (A.C.M.R. 1978). Six should be the minimum number, but nine to twelve should be the goal. Various studies suggest, and various commentators argue, that both representativeness and reliability decrease significantly as juries are reduced below twelve and fatally so in juries of six. *See, e.g., VAN DYKE*, *supra* note 245, at 194-203. Capital cases should be tried by a minimum of twelve members, and the G-1 should detail eighteen for such cases.

then be alphabetically shuffled into that quarter's list of new arrivals so as not to rise together to the top of the list again.<sup>307</sup>

The G-1 would be responsible for notification to the members of their assignment and the date, time, place, and uniform for trial. She would issue orders from the installation commander to each member, including orders to active duty for reserve personnel.<sup>308</sup> Any special instructions would come from the military judge through the G-1. Depending on the pace of jury trials at a particular installation, the G-1 could notify personnel who are approaching the top of the list of their potential impending assignment.

## 2. *The U.S. Navy and Deployed Units*

This model uses the ground installation, base, or post as a center of gravity for the venire pool. The Navy currently conducts some courts-martial at sea, where the "installation" is normally the ship. The random selection method of the model would generally satisfy fair cross-section standards and alleviate "court-packing" concerns under these circumstances. However, everyone on board works for the captain of the ship in relatively close quarters, and the potential influence problems would remain. Every ship has a home port, and every ship pulls into some port on a regular basis. Under this model, the Navy would conduct courts-martial ashore almost exclusively.<sup>309</sup> The base or station would serve as the installation. Home ports would add ships' companies to their venire pools and make non-availability field entries for ships' companies that are put-

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307. This model is not dependent on a computer database program. The principles are subject to manual application. Each calendar quarter, the G-1 would manually shuffle all of the names received along with the names of any new arrivals and personnel who are just completing court-martial member duty. The shuffled quarterly additions would then be added to the bottom of a "hard-copy" venire pool list.

308. Reserve personnel would be paid and would earn retirement points for jury duty. They would not be excused from regularly scheduled drill or periods of annual active duty training. Some reserve personnel reside long distances from the base or station where they drill. If these individuals did not reside near (perhaps more than 100 miles away) any base or station to which they could be administratively attached for court-martial duty, they could be exempt.

309. One broad exception, which involves relatively frequent naval operations, would permit trial at sea. Where several ships are traveling by squadron or group, such units can be designated as one "installation" for court-martial member selection purposes.

ting to sea within thirty days. Panels that are selected from other ports' venire pools would try ship's company accused worldwide, if necessary.

Likewise, members of air and ground units that are deployed overseas would maintain their "place in line" on the venire pool at their parent installations. Non-availability field entries would bypass their names until they returned. Deployed personnel, like ships' companies, could be tried worldwide, if necessary. Sometimes, units deploy for indeterminate periods into remote or hostile areas that are not serviced conveniently by a base or station. These units would operate under the jury trial regime described below for "time of war."

### 3. *Time of War*

Combat requires deployment, reorganization, and modification of military units, including some military installations themselves. This article's proposed model of jury selection based on installation-wide continuity requires modification during sustained large-scale hostilities and some small-scale deployments. Further, combat requires a measure of unit continuity and cohesion not afforded by constantly rotating court-martial panels.

In time of war, non-theater military installations would continue to operate under the model described above. The senior commander *in-theater* would designate ad-hoc "installations" for court-martial purposes. The commander could make these designations where and when the administrative or operational scenario permitted or required. Depending on the size of the deployment and the anticipated duration of hostilities, the commander could designate several "installations." He could designate them according to geography, task organization, administrative capabilities, or other convenient distinction. In the alternative, the commander could designate just one "installation." Once the commander designates the "installation," members for courts-martial would be chosen in the same

way as under the basic model, but panels would sit for pre-determined periods of time rather than for individual cases.<sup>310</sup>

## B. Rationale Supporting the Proposed Model

### 1. *Meeting and Exceeding the Constitutional Standards*

#### a. *Random Selection*

Random selection of jurors is not a constitutional goal unto itself. Instead, it serves the dual purposes of fairness and diversity. In the individual case, it is fair, and it appears fair because the process involves no interested party.<sup>311</sup> In general, it ensures that all juries are empanelled by the same standard. It furthers equality between one case and the next. It enhances the notions and appearances of justice. Random selection also helps to achieve the diversity of society that is sought through the fair cross-section requirement.<sup>312</sup>

Civilian jurisdictions rely typically on voter registration lists, vehicle or drivers license registration records, tax roles, or even telephone directories to source venire pools.<sup>313</sup> As random methods of reaching large unknown and indeterminate populations, these methods achieve, as best they can, fairness and diversity. The military knows, on a daily basis, exactly who is within the geographical boundaries of its jurisdictions and their physical availability.<sup>314</sup> Personnel accountability is supposed to be a military hallmark. Further, the very existence of the armed services depends upon the expendability of every individual serving. The military (hopefully) trains for the eventuality of losses at all levels. The military is comprised of jurisdictions full of imminently available and immediately

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310. During the Civil War, the Confederate Army used courts-martial comprised of three permanent members who were assigned at the corps level. On 9 October 1862, the Congress of the Confederate States of America passed "An Act to organize Military Courts to attend the Army of the Confederate States in the field and to define the Powers of said Courts." See WINTHROP, *supra* note 81, at 1006-07. Interestingly, these courts were independent of the commands to which they were assigned. See *id.*

311. Author Jon M. Van Dyke noted that "[j]urors are supposed to be drawn at random from the community. When they are not, the jury may overrepresent [sic] some segments of society and underrepresent [sic] others, an imbalance that raises the specter of bias." VAN DYKE, *supra* note 245, at xi.

312. See *infra* note 319.

313. See 1 ANN FAGAN GINGER, JURY SELECTION IN CIVIL & CRIMINAL TRIALS §§ 2.25-2.27 (2d. ed. 1984); GOBERT, *supra* note 67, § 6.01.



reachable jurors.<sup>315</sup> The military services are uniquely capable of achieving fairness and diversity through efficient random selection that involves minimal institutional disruption. In combat, of course, the military takes real casualties. Clearly, the military justice process should not multiply these effects by removing needed personnel from the “front lines” for court-martial member duties.<sup>316</sup> The standing panels proposed under this model for wartime account for this requirement without harming the principles of random selection or fair cross-section.

Scholars, legislators, practitioners, and others have proposed models that advance some element of random selection. These proposals, however, leave the actual selection to the convening authority, “the unit,” or some representative of executive or quasi-judicial authority, or they leave some facet of juror screening in place, or both.<sup>317</sup> The model proposed in this article eliminates any human bias from the process, thereby maximizing impartiality.

### *b. Fair Cross-Section*

The fair cross-section requirement ~~is~~ of constitutional stature.<sup>318</sup> One of the premises of the jury system is that it incorporates community norms and standards.<sup>319</sup> The military, much more than civilian jurisdictions, involves transitory populations. The model’s longevity preference favors

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314. David Schleuter identified computerized random selection as particularly amenable to the military. “I cannot believe that the same ingenuity that coordinated the massive air strikes in the Middle East could not be used to select court members for a court-martial when a service member’s liberty and property interests are at stake.” David Schleuter, *Military Justice for the 1990’s—A Legal System Looking for Respect*, The Twentieth Annual Kenneth J. Hodson Lecture delivered to The Judge Advocate General’s School, U.S. Army (Mar. 28, 1991), in 133 MIL. L. REV. 20 (1991).

315. Under the model proposed in this article, 28 U.S.C. § 1863(b)(6), which exempts active duty service members from federal jury service, should be amended to excuse reserve personnel from federal jury duty. *See* 28 U.S.C. § 1863(b)(6) (1994). The “expendability” of reserve personnel in their civilian employment or endeavors is not at all so certain. Relieving them of any burden to sit as federal petit or grand jurors should help to alleviate the disruption to the course of their livelihoods.

316. This is not always a concern. In *United States v. Beehler*, the staff judge advocate submitted to the convening authority a nomination list that contained the names of only five people, all of whom were then detailed by the convening authority. 35 M.J. 502, 503 (A.F.C.M.R. 1992). The explanation was that availability of potential members was severely limited due to the installation’s heavy involvement in Operation Desert Shield and preparations for deployment to Southwest Asia. *Id.* Interestingly, four of the five members were commanders. *Id.*

jurors who have acclimatized to the community, personally and profes-

317. As early as 1919, Brigadier General Samuel Ansell, the acting Judge Advocate General of the Army, proposed that the convening authority select an initial panel from which a judge advocate would select eight members to hear a general court-martial or three members to hear a special court-martial. See *THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS 1775-1975*, at 133 (1993). General Ansell proposed a unique feature that was designed to enhance the concept of trial by peers. Of the eight members selected to try general courts martial, three would be of the same rank as the accused. *Id.* Three fourths of the members would have to agree on a finding of guilty, thereby requiring the concurrence of at least one of the accused's peers. General Ansell failed to reconcile this interesting dynamic with his concurrent recommendation to increase preemptory challenges to two. See *id.*

In the early 1970s, several different proposals surfaced. See Birch Bayh, *The Military Justice Act of 1971: The Need for Legislative Reform*, 10 AM. CRIM. L. REV. 9 (1971); Kenneth J. Hodson, *The Manual for Courts-Martial — 1984*, The First Annual Kenneth J. Hodson Lecture delivered to The Judge Advocate General's School, U.S. Army (Apr. 12, 1972), in 57 MIL. L. REV. 1 (1972).

Several proposals and implemented models seek harmony with the existing criteria of Article 25. They fail to account for the inherent tension between random selection and selection according to subjective criteria. See Rex Brookshire II, *Juror Selection Under the Uniform Code of Military Justice: Fact and Fiction*, 58 MIL. L. REV. 71, 96-104 (1972). In *United States v. Yager*, the COMA upheld a system by which the convening authority randomly selected members from a screened "master juror list." 7 M.J. 171 (C.M.A. 1979). In *United States v. Smith*, the COMA again sanctioned random selection, as long as the convening authority personally appoints the members who are randomly selected. 27 M.J. 242 (C.M.A. 1988). The *Smith* court stated:

We are aware that at times there have been experiments in the armed services with some form of random selection of court-martial members . . . [I]t would appear that even this method of selection is permissible, if the convening authority decides to employ it in order to obtain representativeness in his court-martial panels and if he personally appoints the court members who have been randomly selected.

*Id.* at 249. Like Brookshire, the COMA wanted it both ways. In essence, the COMA does not condemn random selection, but it requires that the convening authority select according to subjective criteria. In other words, it requires that the selection *not* be random.

In 1992, another commentator proposed a model similar to Brigadier General Ansell's, in which the convening authority would nominate potential members on the sole consideration of availability. See Lamb, *supra* note 98, at 160-61. The convening authority would detail a military judge or an inspector general as a "panel commissioner" who would randomly select a panel from the list of nominees. *Id.* Under this model, panels would likely be chosen from those who are considered by the convening authority to be the most expendable. Furthermore, all of the members would still be selected by the convening authority; they simply go through an intermediate selection process before getting to the courtroom. The model would not address any of the "court stacking" or influence concerns discussed in Part III of this article.

318. See *supra* note 39 and accompanying text.

sionally. The model includes members of the reserve component in the venire pool. This expansion of the community from which to draw a fair cross-section is justified on several practical and theoretical grounds.

The services depend more and more on their reserve components. Military leadership considers the reserves to be an integral part of mission and operation, a "force multiplier."<sup>320</sup> From a practical standpoint, including the reserves in the active military justice process would be in keeping with their increased roles and responsibilities. It would also spread the

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319. In the introduction to his work, Jon Van Dyke wrote:

In a complex society such as ours, a jury that is the true "conscience of the community" must include a fair cross-section of the groups that make up the community. Each person comes to the jury box as an individual, not as a representative of an ethnic, racial, or age group. But since people's outlooks and experiences do depend in part upon such factors as socioeconomic status, ethnic background, sex, or age, to ignore such differences is to deny the diversity in society as well as the fundamental character of the "community" whose voice is to be heard in the jury room.

... A jury representing the broad spectrum of society is a jury whose independence and impartiality need not be suspect, and whose legitimacy is thus protected.

Steps that threaten the jury's impartiality by impeding its independence and representativeness should be viewed with great suspicion.

VAN DYKE, *supra* note 245, at xiv. "[W]e . . . want . . . jurors to draw upon and combine their individual experiences and group backgrounds in the joint search for the most reliable and accurate verdict." ABRAMSON, *supra* note 147, at 11. "[T]he democratic aim of the cross-sectional jury was to enhance the quality of deliberation by bringing diverse insights to bear on the evidence, each newly evaluating the case in light of some neglected detail or fresh perspective that a juror from another background offered the group." *Id.* at 101. "[T]he purpose of the cross-sectional jury . . . was to draw jurors together in a conversation that, although animated by different perspectives, still strove to practice a justice common to all perspectives." *Id.* at 127.

320. See, e.g., *Prepared Statement of Major General Roger W. Sandler, USA (Ret.), Executive Director, Reserve Officers Association of the United States Before the House Appropriations Committee, National Security Subcommittee*, FED. NEWS SERV., Mar. 19, 1998 (providing a thorough exposition of the myriad ways the reserve components are expanding and contributing to the mission of the armed forces); *Prepared Statement of Vice Admiral D.T. Oliver, Chief of Naval Personnel and Deputy Chief of Naval Operations (Manpower and Personnel) and Rear Admiral B.E. McGann, Commander, Navy Recruiting Command, Before the House Committee on National Security, Military Personnel Subcommittee*, FED. NEWS SERV., Mar. 12, 1998.

jury duty burden, easing somewhat the diversion of the active military from its "basic fighting purpose."<sup>321</sup>

From a theoretical standpoint, including reservists in the venire pool would enliven the constitutional concept of civilian control of the military. The constitutional framers intended for juries to serve as a check on government.<sup>322</sup> Juries check the written law of the legislature and the enforcement of that law by the executive.<sup>323</sup> The framers also intended that civilians not only check, but also control, the military.<sup>324</sup> Reservists who are assigned to court-martial panels would serve both purposes simultaneously because they are civilians who have an understanding of the military. They would also provide a broader community for selection. Further, because military jurisdiction has expanded to encompass common law crimes during peacetime,<sup>325</sup> civilian participation ensures a civilian stake in civilian security and welfare.<sup>326</sup> Finally, by involving civilians in the process, they have a stake in the military justice system. They learn about the military justice system.

The judiciary sees military society as a separate society from that of civilians because military society is predicated on the maintenance of dis-

321. United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 17 (1955). "[T]rial of soldiers . . . is merely incidental to an army's primary fighting function. To the extent that those responsible for performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served . . ." *Id.* See *infra* text accompanying note 396-397 (attacking the specific reasoning of this proposition). This general message, that the armed forces exist to fight and to win America's battles, is meritorious.

322. See Baldwin v. New York, 399 U.S. 66 (1970).

[T]he primary purpose of the jury is to prevent the possibility of oppression by the government; the jury interposes between the accused and his accuser the judgment of laymen who are less tutored perhaps than a judge or panel of judges, but who at the same time are less likely to function or appear as but another arm of the government that has proceeded against him.

*Id.* at 72.

323. See *supra* notes 113, 132.

324. See generally JAMES B. JACOBS, *SOCIO-LEGAL FOUNDATIONS OF CIVIL-MILITARY RELATIONS* (1986) (providing unique insight and perspective on numerous subtleties of civilian interaction and control of the military based on constitutional and practical considerations); JOHN E. NOWAK ET AL., *CONSTITUTIONAL LAW* 211-12 (2d ed. 1983) (outlining the fundamentals of the concept of civilian control of the military); JOSEPH W. BISHOP, *JUSTICE UNDER FIRE* 9 (1974) (stressing the importance of civilian control of the military).

325. See *supra* notes 182-190 and accompanying text.

cipline.<sup>327</sup> Success of the armed forces in combat may well depend on the abilities of its members to transcend traditional societal beliefs and behavior. Therefore, a separate military society may be valuable, even crucial, to the effective functioning of the armed forces.<sup>328</sup> Where there is the tendency toward separatism, however, there exists also the danger of actual or perceived elitism or **extremism**.<sup>329</sup> There is at least the danger of misunderstanding and misperception. Controlled by and serving civilians, the military should be familiar to civilians. Civilians should understand and appreciate the separation that exists, not fear it. Where separate norms and practices are inherently necessary—such as combat and its preparation—the concept of separation achieves maximum justification. Otherwise, the military should take advantage of opportunities to demystify its practices or to bring them into the mainstream, especially regarding the constitutional rights of its members.<sup>330</sup> Expanding the venire pool to include the reserves would encourage civilian understanding and appreciation for military justice, in place of the present system, which engenders the opposite.

## 2. *Curtailing Unlawful Command Influence in the Jury Selection Process*

### a. *Appearance Supported by Reality*

In 1970, Robert Sherrill, a critical commentator, wrote a scathing, even paranoid, indictment of military justice.

Jittery, naive, suspicious in matters relating in any way to “rights,” the military professionals do the best they can. But

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326. Before striking down the Canadian courts-martial member selection process, the Canadian Supreme Court specifically found the Canadian Charter of Rights and Freedoms applicable to the military. *Généreux v. The Queen* [1992] S.C.R. 259, 281. *See supra* notes 133-141 and accompanying text.

Although the [military disciplinary code] is primarily concerned with maintaining discipline and integrity in the Canadian Armed Forces, it does not serve merely to regulate conduct that undermines such discipline and integrity. The code serves a public function as well by punishing specific conduct which threatens public order and welfare. Many of the offences with which an accused may be charged . . . relate to matters which are of a public nature.

their training has left them pitifully limited; they wear blinders that shut out the beauty of the liberties of the civil landscape and hold their eyes to the old rutted military road. They fight very well. But they are not much good, either by training or instinct, for anything else. And since fighting alone is enormous enough a responsibility in a world full of fighters, the military should not be given the extra burden of reforming its justice.

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327. In *Parker v. Levy*, the U.S. Supreme Court stated:

This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society . . . . The differences between the military and civilian communities result from the fact that "it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise."

417 U.S. 733, 743 (1974) (quoting *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955)).

The need for special regulations in relation to military discipline, and the consequent need and justification for a special and exclusive system of military justice, is too obvious to require extensive discussion; no military organization can function without strict discipline and regulation that would be unacceptable in a civilian setting. . . . [C]enturies of experience has developed a hierarchical structure of discipline and obedience to command, unique in its application to the military establishment and wholly different from civilian patterns.

*Chappell v. Wallace*, 462 U.S. 296, 300 (1983). "We have only recently [in *Parker v. Levy*] noted the difference between the diverse civilian community and the much more tightly regimented military community." *Middendorf v. Henry*, 425 U.S. 25, 38 (1976) (denying the military accused before a summary court-martial the right to counsel). "To prepare for and perform its vital role, the military must insist upon a . . . discipline without counterpart in civilian life. The laws and traditions governing that discipline have a long history; but they are founded on unique military exigencies as powerful now as in the past." *Schlesinger v. Councilman*, 420 U.S. 738, 757 (1975) (holding that federal courts may not interfere in on-going courts-martial). "[I]nherent differences in values and attitudes . . . separate the military establishment from civilian society. In the military, by necessity, emphasis must be placed on the security and order of the group rather than on the value and integrity of the individual." *Reid v. Covert*, 354 U.S. 1, 38-39 (1957) (holding that UCMJ jurisdiction cannot be extended to civilian dependents who accompany the armed forces overseas in peacetime). "The military constitutes a specialized community governed by a separate discipline from that of the civilian." *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953) (denying writ of habeas corpus to review military draft induction).

Justice is too important to be left to the military. If military justice is corrupt—and it is—sooner or later it will corrupt civilian justice.<sup>331</sup>

More than a decade later, while military justice had not yet poisoned all of civilian justice, it was continuing to lend credence to Sherrill's criticism. In *United States v. Swagger*,<sup>332</sup> the installation commander and convening

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328. See *supra* note 119 and accompanying text. See also *United States v. Gay*, 16 M.J. 586, 612 (A.F.C.M.R. 1983) (Miller, J., dissenting), *aff'd*, 18 M.J. 104 (C.M.A. 1984). Delivering what is perhaps the simplest rationale for the separate society concept, Judge Miller surmised that:

[The Supreme Court] has also recognized that . . . a[n effective military] force can best be achieved via a military society apart from the civilian one; a society in which individual military members, who most often come directly from the civilian society, can be trained (or reprogrammed) to the point that, setting aside the teachings of a lifetime, they will be able to violently kill other human beings upon command and obey all commands of designated supervisors, even though by doing so, they may well subject themselves to a violent death.

*Id.* In a footnote, Judge Miller continues:

Simply stated, it involves transitioning a typical recruit from a society that disdains death and violence into one in which he or she must accept it as a part of everyday life. It involves nothing short of re-programming a sizable portion of their lifelong value systems, at least with respect to their acceptance of military mission.

*Id.* at 612 n.28.

In *Généreux v. The Queen*, the Canadian Supreme Court noted that it, as well as the accused in the case, appreciated this principle as well.

The appellant concedes that a separate system of military law, along with a distinct regime of service tribunals to apply this law, is consistent with [the Canadian Charter of Rights and Freedoms]. He agrees it is necessary that military discipline be enforced effectively and speedily by tribunals whose members are associated with the military and therefore sensitive to its basic concerns. At the same time, he submits that, within the inherent limits of an institution having the power to discipline its own members, the adjudicative or disciplinary body must meet the standards of independence and impartiality required by the [Charter].

authority appointed his provost marshal as the president of the accused's panel.<sup>333</sup> This colonel had twenty-five years of experience as a military policeman. His previous assignments included other tours as installation

329. The word "extremism" is used here in its general sense. That is, the general norms of the military culture may become, or may be perceived to be, so out of step with those of civilian society as to be considered dangerous or otherwise socially unacceptable. Recently, former Assistant Secretary of the Army Sara Lister referred to Marines as extremists, and she went on to say, "[w]herever you have extremists, you've got some risks of total disconnection with society. And that's a little dangerous." Bill McAllister & Dana Priest, *Under Fire, Army Assistant Secretary Resigns; Fallout From Speech Calling Marines 'Extremists' Prompts Departure*, WASH. POST, Nov. 15, 1997, at A1. She almost certainly did not mean to characterize the Marine Corps as racist or as advocating anti-governmental or anti-constitutional violence, activities that are commonly believed to be elements of "extremism." Instead, her comments epitomize the point here. She almost certainly *did* misunderstand the nature of the Marine Corps' mission, history, role, and traditions. Mrs. Lister was a civilian of high office, *within the Department of Defense*. When someone of her stature voices concerns of this nature, the military is on clear notice that civilians misunderstand the military and may react in unexpected and detrimental ways. Ironically, her follow-on comment, quoted above, is exactly right.

330. Brigadier General John Cooke, the former Commander, United States Army Legal Services Agency and the former Chief Judge, United States Army Court of Criminal Appeals, recently noted that part of the genius underlying the Constitution is its link between the people and the soldiers. See Brigadier General John S. Cooke, *The Manual for Courts-Martial—20X*, The Twenty Sixth Annual Kenneth J. Hodson Lecture delivered to The Judge Advocate General's School, U.S. Army (Mar. 10, 1998), in 156 MIL. L. REV. 1 (1998). He noted that American service members swear an oath of allegiance to the *Constitution*, and thereby to the people. *Id.* Military justice is a system that belongs to the military, he professed, but the military is accountable to the people. *Id.* General Cooke proclaimed that the American people care about servicemen. They expect an effective fighting force *in consonance with the values in the Constitution*. *Id.* at 5

Retired Brigadier General Dulaney L. O'Roark, Jr. expressed similar sentiments in a 1995 lecture on leadership. "While young Americans are still capable of patriotism and commitment to national service, they have increasing expectations of fair treatment and good leadership. If they find this lacking, they will 'vote with their feet' and quickly take us back to the hollow army of the mid-1970s." Brigadier General (ret.) Dulaney L. O'Roark, Jr., *Transformational Leadership: Teaching the JAG Elephant to Dance*, The First Annual Hugh J. Clausen Leadership Lecture delivered to The Judge Advocate General's School, U.S. Army (Feb. 22, 1995), in 146 MIL. L. REV. 224 (1994). General O'Roark briefly advocated three peacetime military justice reforms that he felt would balance the needs of discipline and the expectations of service members regarding fair treatment. First, military judges should be given sentencing authority similar to that of their civilian counterparts, to include suspended sentences, shock probation, and community service. *Id.* at 228. Second, a form of random jury selection that does not compromise seniority should be developed. *Id.* Third, convictions should be by unanimous jury vote only. *Id.*

331. ROBERT SHERRILL, *MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC* 212-13 (1970).

332. 16 M.J. 759 (A.C.M.R. 1983).

333. *Id.* at 759.



provost marshal and Criminal Investigation Command region commander.<sup>334</sup> He had extensive education in the field of law enforcement, including a masters degree in criminal justice.<sup>335</sup> He testified for the prosecution routinely and admitted on voir dire that “there was ‘no way’ he could leave this experience ‘at the courtroom door.’”<sup>336</sup> The appointment by the convening authority of his subordinate who was directly and immediately responsible for crime prevention on the installation is only slightly less incredible than the military judge’s denial of the challenge for cause against this member. The Army Court of Military Review complained:

Once again this court is required to adjudicate an issue on appeal that should never have come to be . . . .

. . .

Our position that the issue raised here is unnecessary litigation has been stated in numerous unpublished opinions of this Court and in . . . [one published opinion], where we pointed out that the appointment of policemen as courts-martial members is not a good practice . . . .

. . .

. . . [T]he very essence of [this member’s] existence as an Army officer was to enforce the law and prevent crime at Fort Ord. To this end he reviewed investigative reports (perhaps even that pertaining to this case) and results of trial. Refemng to our common experience and knowledge we are aware of the great responsibility of a provost marshal at a major Army installation, and that ultimately he directs, coordinates, or consults on all installation law enforcement activity. We believe that to ask or expect an officer to step from that position temporarily to that of president of a court-martial, and to exercise an objective and unbiased mental process to determine the guilt or innocence of an accused, places a burden upon an individual that is greater than most can or should bear. We are convinced that at least is the common perception. Therefore, as the embodiment of law enforcement and crime prevention at Fort Ord, [this member’s] presence at Swagger’s trial as president of the court-martial provided an “appearance of evil” . . . and requires reversal. At the risk of being redundant—we say again—individuals assigned to military police duties should not be appointed as members of

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334. *Id.* at 760.

335. *Id.*

336. *Id.*

courts-martial. Those who are the principal law enforcement officers at an installation must not be.<sup>337</sup>

More than a decade after *Swagger*, military judges *still* fail to grasp its meaning. In *United States v. Dale*,<sup>338</sup> the convening authority detailed his deputy chief of security police to the court-martial panel in a child sexual abuse case.<sup>339</sup> The CAAF noted that this panel member was intimately involved in day-to-day law enforcement; indeed, he was the “embodiment of law enforcement and crime prevention” for the installation.<sup>340</sup> The CAAF set aside the conviction after finding that the military judge abused his discretion in denying a challenge for cause.<sup>341</sup>

In 1991, David Schleuter delivered a lecture on military justice at The Judge Advocate General's School, U.S. Army, which he subtitled “a legal system looking for respect.”<sup>342</sup> “At a minimum, it looks bad,” said Schleuter about the selection of members by commanders.<sup>343</sup> One year later, an

337. *Id.* at 759-60 (citations omitted).

338. 42 M.J. 384 (1995).

339. *Id.* at 385.

340. *Id.* at 385-86.

341. *Id.* at 386. See *United States v. Berry*, 34 M.J. 83 (C.M.A. 1992) (finding abuse of discretion in denial of causal challenge against a member who was the command duty investigator for base security and who knew and worked with key government witnesses). *But see United States v. Fulton*, 44 M.J. 100 (1996) (finding that it was proper for the trial judge to deny a challenge against a member who was the chief of security police and had contact with the accused's commander only on serious matters that required high level decisions); *United States v. McDavid*, 37 M.J. 861 (A.F.C.M.R. 1993) (noting that there is no per se exclusion of security police from court-martial panels).

342. See Schleuter, *supra* note 314.

343. *Id.* at 20. Sherrill and Schluter are not alone. “It is a system which, in critical aspects no longer meets the standards and expectations established by the developing currents of due process.” Kevin Barry, *Reinventing Military Justice*, PROCEEDINGS, July 1994, at 57. “[T]his method of jury selection constitutes an ‘insurmountable’ obstacle to fairness in . . . courts-martial proceedings. Notwithstanding the integrity of military commanders, it is impossible to avoid at least the appearance of impropriety.” Ruzic, *supra* note 70, at 288-89. “Appearance-symbolism is critical in any system of justice. It is even more critical when the system is one in which the bulk of criminal defendants—often members of disadvantaged minorities—find themselves toward the bottom of an official totem pole . . .” Eugene Fidell, *The Culture of Change in Military Law*, 126 MIL. L. REV. 132 (1989). “As long as the possibility of [command] control remains, it will continue to bring suspicion and discredit upon trials by courts-martial and upon the administration of military justice itself.” Frank Fedeles, *The Evolution of the Court-Martial System and the Role of the U.S. Court of Appeals in Military Law* 152 (1954) (unpublished DJS dissertation, George Washington University School of Law) (on file with the George Washington University School of Law library).

interesting addition to the seemingly endless problems surrounding convening authority involvement in the member selection process appeared in *United States v. Kroop*.<sup>344</sup> The accused, a lieutenant colonel squadron commanding officer, faced charges of sexual harassment and sexual misconduct with subordinate officers and enlisted women. At the same time, his general court-martial convening authority was under investigation for “crimes of a sexual nature similar to appellant’s or . . . misconduct . . . at least equally reprehensible . . . even if it were not criminal.”<sup>345</sup> The Air Force Court of Military Review decided that this did not disqualify the convening authority from referring charges to, and selecting the members for, the accused’s court-martial.<sup>346</sup> Would civilians vest prosecutorial discretion in a person who is under investigation himself? Perhaps. Would they allow the jury to be chosen by a suspected criminal? Assuredly not. At a minimum, *Kroop* looks bad.

Four years after Mr. Schlueter’s address, another lecturer, Jonathan Lurie, found little intervening improvement. “Let me predict that unless our military justice system is reformed, either from within or without, mil-

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344. 34 M.J. 628 (A.F.C.M.R. 1992).

345. *Id.* at 632.

346. *Id.* at 632-33. Curiously, the court comforts itself by finding that the “appellant’s convening authority did not personally compile the pool of officers used to select [the] appellant’s court members. He selected the court members from a pool of potential court members nominated by the [intermediate] commander. . . .” *Id.* at 632. Equally perplexing was the court’s previous order for new action.

The first time this case came before us we noted that the convening authority acting on [the] appellant’s case was himself suspected of sexual misconduct similar to that alleged against appellant. In “*an abundance of caution* over the need to preserve the appearance of propriety in the military justice system,” we set aside the action taken by that convening authority. We remanded the case for new staff judge advocate’s recommendations and new action by a different convening authority.

*Id.* at 630-31 (emphasis added).

itary justice will keep on looking for respect, and will face insuperable difficulty in finding it."<sup>347</sup>

Recently, the Army tried the Sergeant Major of the Army for alleged sexual harassment, indecent assault, and various other sexually related offenses. The trial was high profile due to its subject matter and the position of the accused as the Army's top enlisted soldier. One need only flip open the *New York Times* to hear the critics of the 1970s speak anew.

The court-martial of **Sgt.** Maj. Gene McKinney on charges of sexual misconduct brings to mind the old saw that military justice is to justice as military music is to music.

. . . [I]n the military justice system, jury members are selected by the officer who convenes the trial, which is roughly like having the district attorney picking all the jurors.

. . .  
.. [W]hen allegations of sexual misconduct surfaced a few years [after the Tailhook scandal of 1991] at the Aberdeen Proving Ground in Aberdeen, Md., the Army reacted swiftly and harshly. It even called a press conference to publicize the cases. The base commander. . . handpicked the jury, and several drill sergeants were sent to prison. In a curious twist, the [base commander] was discovered immediately afterward to have had an extramarital affair and was forced to retire.

All these cases—and their resulting unfairness—can be traced to one larger problem. The [UCMJ], last overhauled in 1983, is **outdated**.<sup>348</sup>

This report appeared before the trial. Sergeant Major McKinney's court-martial acquitted him of eighteen specifications involving sexual misconduct. The court convicted him of one specification of obstruction of justice.<sup>349</sup> The court sentenced him to a one-grade reduction in rank and a **reprimand**.<sup>350</sup> Evidently, the report's concerns were unfulfilled as to this

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347. Jonathan Lurie, *Military Justice 50 Years After Nuremberg: Some Reflections on Appearance v. Reality*, Remarks at the Conference on Nuremberg and the Rule of Law (Nov. 18, 1995), in 149 MIL. L. REV. 189, 190 (1995). Mr. Lurie is the official historian of the CAAF.

particular trial. However, no post-trial report celebrated the ability of a military jury to dispense justice independently.<sup>351</sup>

The model proposed in this article removes the military's "district attorney" from the jury-picking process altogether. The model eliminates "court-stacking," along with perceptions like Sherrill's, Schleuter's, Lurie's, and that of the New York Times. The *Swagger* and *Kroop* circumstances would be obsolete. By diffusing random selection over a much larger population than is currently considered, the model also substantially reduces the potential for direct unlawful influence. The *Youngblood/Rey-*

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348. Joseph Finder, *The Army on Trial*, N.Y. **TIMES**, Feb. 17, 1998, at A19. Finder launches a multi-faceted attack on military justice in general and its application to Sergeant Major McKinney in particular. Some of his criticism is unfounded and some is based on incorrect assumptions. However, the McKinney trial is a classic modern example of the practical problems that plague the appearance of the military's jury selection process.

In a military trial, lawyers work for the convening authority . . . .

"It's akin to a district attorney prosecuting a case and selecting the jury members," said Eugene Fidell, the President of the independent National Institute of Military Justice.

In the military, it is not unethical for potential jury members to work under the command of the convening authority, even though the jurors often owe their next job assignment to performance assessments made by the convening authority.

"You have the potential for the convening authority to ensure that people on the jury are people he is convinced are going to be hard-liners," said Kevin Barry, a former Coast Guard judge.

Eric Rosenberg, *Similarities and Big Differences in Military, Civilian Trials*, **ARIZ. REPUB- LIC**, Feb. 1, 1998, at A21. In fact, the perceptions sometimes get completely out of hand. "Another key difference is that, unlike civilian judges, military judges are not appointed to a fixed term—and *they serve at the will of the convening authority*. 'Thus, they may or [may] not be independent,' Fidell said." *Id.* (emphasis added). Fidell's quote was almost certainly taken out of context by the newspaper.

349. See Mark Thompson, *No Go: Why the Army Lost a High-Profile Sex Case*, **TIME**, Mar. 23, 1998, at 52.

350. See Andy Soltis, *Jury Sparer Sex-Case Sarge Time in the Brig*, N.Y. **POST**, Mar. 17, 1998, at 12.

351. Interestingly, Sergeant Major McKinney, an African American, was tried by a jury of four other Sergeants Major and four officers. Of the officers, two were female and one was African American. See *Jury Chosen in Sex Trial of Army Sergeant Major*, **DALLAS MORNING NEWS**, Feb. 7, 1998, at 4A. That *the perception* of injustice took hold at all, even in light of this "rainbow coalition" panel, sends the military a clear message that its jury selection practice is considered largely unacceptable.

nolds staff meetings would have minimal impact because the chance of a member being present would be slight.

The need to revise U.S. military jury selection methods is reflected in the reforms of other nations,<sup>352</sup> most notably the nation that gave us the jury trial in the first place. It is also reflected in reforms in other similar areas of military justice, most notably the continued efforts to protect the independence of the military judge.

### *b. Reforms in Other Nations*

In February 1997, the European Court of Human Rights ruled, in *Findlay v. United Kingdom*,<sup>353</sup> that the British court-martial member selection system violated the European Convention for the Protection of Human Rights and Fundamental Freedoms (Human Rights Convention).<sup>354</sup> Findlay was tried in 1991. Britain's 1955 Army Act<sup>355</sup> then governed the British member selection system. Like the current UCMJ, the convening "officer," under that statute, preferred the charges, specified the type of court-martial, and personally selected the members.<sup>356</sup> The European Commission of Human Rights, first reviewing the case,<sup>357</sup> unanimously agreed that this method violated Article 6(1) of the Human Rights Convention. Article 6(1) states in pertinent part that "[i]n the determination . . . of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."<sup>358</sup>

The European Court of Human Rights agreed. The court set forth the following elements of independence: (1) the manner of appointment of court-martial members, (2) the term of office of court-martial members, (3) the existence of guarantees against outside pressures, and (4) an appearance of independence.<sup>359</sup> As to impartiality, the court articulated the

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352. See, e.g., *supra* notes 133-141, 326, 328 and accompanying text (regarding Canadian reform).

353. App. No. 22107/93, 24 Eur. H.R. Rep. 221 (1997).

354. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter Human Rights Convention], reprinted in ALESSANDRA DEL RUSSO, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 271 (1971).

355. Army Act, 1955, 3 & 4 Eliz. 2, ch. 18 (Eng.).

356. See *id.* §§ 84-90.

357. *Findlay*, 24 Eur. H.R. Rep. at 234 (commission report).

358. Human Rights Convention, *supra* note 354, art. 6(1j).

following elements: (1) subjective freedom from personal prejudice or bias and (2) the existence of sufficient guarantees to exclude any legitimate objective doubt as to this freedom.<sup>360</sup> The court held that the “convening officer was central to [the] prosecution and closely linked to the prosecuting authorities.”<sup>361</sup> The court found that the members, “all of whom were . . . subordinate to . . . and serving in units commanded by [the convening officer],” were not sufficiently independent of the convening officer and that the trial failed to offer adequate guarantees of impartiality.<sup>362</sup>

The government of the United Kingdom argued several theories in support of its system of member selection to the commission.<sup>363</sup> Before

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359. *Findlay*, 24 Eur. H.R. Rep. at 244.

360. *Id.* at 244-45.

361. *Id.* at 245.

362. *Id.* at 246 (noting specifically that the accused’s “misgivings about the independence and impartiality of the tribunal were objectively justified”). This is a not revolutionary analysis. In 1977, Jonathan Van Dyke wrote:

The impartiality . . . built into the jury system—and protected by the Constitution’s Sixth Amendment guarantee of trial by “impartial jury”—can, however, be threatened. In order to be impartial, and be viewed as impartial (and hence the legitimate vehicle of justice—a critical aspect of the jury system), a jury must also be independent. Freedom from outside influence is necessary to preserve impartiality. If jury members seem to be hand-picked by one side or the other, the jury’s impartiality and hence its integrity will be suspect. It may be—or may seem to be—biased because of its makeup. The jury, then, must be chosen in a way that leads to its acceptance by the community as independent.

VAN DYKE, *supra* note 245, at xiii.

363. The government first asserted that “the special disciplinary requirements flowing from the vital duties of the armed forces require a separate code of military law and, in turn, a separate military judicial system.” *Findlay*, 24 Eur. H.R. Rep. at 235 (commission report). The government went on to argue that procedural safeguards protected the independence of the members. The government cited, among other things: the oath taken by the members, the inability of the convening officer to remove individual members, the majority requirement for member decisions, and the secrecy of deliberations. *Id.* The government also identified several structural guarantees of the independence of the members: 1) the prosecutor was not appointed by the convening authority, but by the independent Army Legal Services; 2) the convening officer’s responsibility was the largely administrative “setting up” of the court-martial; 3) the members were chosen from various different units, some were not appointed by name, and none of them knew the convening officer; and 4) the accused did not object to the constitution of the court. *Id.* at 235-36. Finally, the government highlighted that the civilian judge advocate (military judge), who was entirely independent of the military, ensured a fair trial. *Id.* at 236.

the court, apparently conceding the case by this point,<sup>364</sup> the government simply revealed its substantially revised procedures contained in the Armed Forces Act of 1996,<sup>365</sup> which were to become effective 1 April 1997. The legislation effectively removes the commanding officer from the court-martial process. Under the new British system, the commanding officer briefs his "higher authority" concerning criminal charges that the commanding officer has investigated. The "higher authority" decides whether to refer the matter to a "prosecuting authority."<sup>366</sup> The prosecuting authority, an independent judge advocate section, is vested with traditional prosecutorial discretion.<sup>367</sup> If the matter is prosecuted, an independent "court administration officer" convenes a court-martial and selects the members.<sup>368</sup> The notes to the legislation point out that "[t]he purpose of the reforms is to reinforce the independence of the courts-martial . . . principally by reducing the apparent influence of the chain of command while preserving its necessary involvement."<sup>369</sup>

As of 1997, Canada, Great Britain, and the European Community all agree that member selection by the convening authority fails to meet minimum standards of independence and impartiality in practice and appearance. How ironic that American colonists wrested independence from Great Britain by force of arms in part because Great Britain denied the colonists the "accustomed and inestimable privilege of trial by jury, in cases affecting both life and property."<sup>370</sup> Now America is alone in the free world in denying the right, as the Constitution describes it, to its service members.

### *c. Reforms in the United States*

Thirty years ago, Congress revised the UCMJ on a theory similar to Great Britain's. In 1968, Congress acted specifically to isolate the presid-

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364. *See id.* at 242.

365. Armed Forces Act, 1996, ch. 46 (Eng.).

366. *Id.* sched. 1, pt. I, § 76.

367. *Id.* sched. I, pt. II, § 83B.

368. *Id.* sched. 1, pt. III, § 84C.

369. *Id.* § 5, notes. *See id.* § 15 notes (stating that "[t]he role of the convening officer is being abolished as part of the wider court-martial reforms included in the [Act], with the purpose of reducing the potential for the chain of command to exercise undue influence over court-martial proceedings").

370. DECLARATION OF THE CAUSES AND NECESSITY OF TAKING UP ARMS para. 3 (July 6, 1775), *reprinted in* SOURCES OF OUR LIBERTIES, *supra* note 69, at 296.



ing officer at courts-martial from the influence of the convening authority. Congress replaced the law officer, who at that time was appointed by the convening authority, with a military judge.<sup>371</sup> This reflected an appreciation for the separation of executive and judicial functions and the potential for unlawful command influence. The amendment, however, did not go far enough. Members, untrained in the law and working directly for the convening authority, arguably require greater protections from command influence than a law officer, who is theoretically cognizant of his impartial role and is working directly for someone other than the convening authority. Further, if the forum choice is members, the independence of the fact-finder and sentencing authority is surely more important than that of the presiding officer, who has important, but not ultimate, decision-making power.

In 1968, Congress decided that the *potential* for influence by the convening authority over the presiding officer warranted change. Why, thirty years later, after continued *demonstrated* influence over the members,<sup>372</sup> has Congress not implemented similar reform for the members?<sup>373</sup> Instead, the focus of today's suggestions is further isolation of the military judge.

The former Chief Judge of the Army Court of Criminal Appeals, retired Brigadier General John Cooke, recently argued to establish tenure for military judges.<sup>374</sup> He opined that military judges *are in fact* indepen-

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371. See Military Justice Act of 1968, Pub. L. No. 90-632, § 826, 82 Stat. 1335, 1336-38.

372. See *supra* Part III.

373. John Henry Wigmore, Dean of the Northwestern University Law School from 1901 to 1929, and best known as the author of JOHN HENRY WIGMORE, ON EVIDENCE, stated:

We are good friends of jury trial. We believe in it as the best system of trial ever invented for a free people in the world's history . . . [W]e believe that a system of trying facts by a regular judicial official, known beforehand and therefore accessible to the arts of corruption and chicanery, would be fatal to justice. The grand solid merit of jury trial is that the jurors of fact are selected at the last moment from the multitude of citizens. They cannot be known beforehand, and they melt back into the multitude after each trial.

John Henry Wigmore, *To Ruin Jury Trial in the Federal Courts*, 19 ILL. L. REV. 97, 98 (1924). Wigmore was distinguishing jury from judge, but the same concerns apply with even greater force to a jury that is hand-picked well before trial.

374. See Cooke, *supra* note 330.

dent, but that they should get credit for it; the public should *appreciate* their independence.<sup>375</sup> Brigadier General Cooke did not, 'however, see a similar need to enhance, let alone to establish, the independence of the members. He acknowledged that member selection is perhaps the area of military justice that is most susceptible to public criticism. He nevertheless proposed to maintain the current method, largely for practical reasons.<sup>376</sup>

Ultimately, this article's model not only removes the convening authority from the member selection process, it also removes the case from his "jurisdiction." The convening authority is charged with the good order and discipline of his unit. His prosecutorial role in the military justice system is consonant with that responsibility.<sup>377</sup> Under the current system, as the unlawful command influence cases illustrate, the commander's prosecutorial or discipline-maintaining functions sometimes hamper the achievement of justice. Restricting the convening authority in words and actions in order to preserve justice also hampers his ability to maintain discipline. As it stands, a commander must be circumspect in his remarks to his unit regarding his views on crime and punishment. Otherwise, he may later influence the same jurors he chooses. Commanders, however, should be perfectly clear on their views about misconduct and its consequences. The military desires commanders whose natural tendency is to react negatively, quickly, and publicly, to crime in their units.<sup>378</sup> Ironically, as addressed in the next subsection, the very rationale for restricting the ser-

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375. *Id.*

376. *Id.* General Cooke stated that the current system generates better quality panels, allows the convening authority the flexibility to replace members efficiently when necessary, and is, in fact, fair. *Id.* He would not change the current system, because he considers none of the proposals he has seen any better (though he expressed willingness to consider further proposals for reform). *Id.* Specifically, members are still military personnel and beholden to commanders, and random selection proposals appear to be administratively over-burdensome. *Id.* General Cooke admitted that this practical rationale does not answer the public's perception, does not alone justify a departure from constitutional standards of jury selection, and fails to address existing unlawful command influence. *Id.* He views the current system as the best default. *Id.*

377. Luther West advocated that, "with only minor exceptions, the system of military justice must be completely removed from the operational control of the military departments, and placed in the hands of civilian administrators, preferably under the control of the Attorney General of the United States." Luther West, *A History of Command Influence on the Military Justice System*, 18 U.C.L.A. L. REV. 153-54 (1970). This view is extreme, and it ignores the inherent obligation and responsibility of commanders for the good order and discipline of their units.

vice member's right to trial by jury was, and continues to be, grounded in the misperception that discipline is thereby enhanced.

### 3. *The Discipline Paradigm of Military Justice*

#### a. *Genesis*

If Article 25 is neither constitutional nor fair, how does it survive? In *Ex parte Milligan*,<sup>379</sup> the Supreme Court explained, in one sentence, *why* the framers “doubtless” intended to exempt the military from any jury-trial requirements.

The *discipline* necessary to the *efficiency* of the army and navy, required other and *swifter* modes of trial than are furnished by the common law courts; and, in pursuance of the power conferred by the Constitution, Congress has declared the kinds of trial, and the manner in which they shall be conducted, for offences committed while the party is in the military or naval service.<sup>380</sup>

The *Milligan* Court considered the justice involved in a jury trial too expensive in terms of discipline for the military. The Court saw a tension between the right to trial by jury and the institutional need for discipline. The *Milligan* Court happened upon the discipline paradigm of military justice and applied it to the constitutional right to trial by jury. Under the discipline paradigm, the principal function of military justice is the maintenance of discipline. The primary tenet of the paradigm holds that, because the commander is responsible for discipline, he should also control the “machinery by which it is enforced . . . .”<sup>381</sup>

World War I, although to a lesser degree than World War II, generated substantial debate regarding the fairness of the military justice system.

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378. Clearly, the commander must not have free reign. Unlawful command influence pertaining to witness intimidation must be policed. See Bower, *supra* note 302, at 88-92 (recommending specific guidelines for educating and protecting convening authorities in this area and suggesting remedial measures when it is too late). The more senior commanders, to whom large populations of potential members report, would still have to maintain a judicious demeanor.

379. 71 U.S. (4 Wall.) 2 (1866). See *supra* Part II (analyzing the case).

380. *Id.* at 123 (emphasis added).

381. BISHOP, *supra* note 324, at 24.

The famous Ansell-Crowder dispute raged over whether the Articles of War should serve as a tool of discipline or a tool of justice,<sup>382</sup> and many reforms emerged in the 1920 Amendments to the Articles of War.<sup>383</sup>

During congressional hearings on the enactment of the UCMJ, the American Bar Association (ABA) recommended the removal of commanders from the court-martial convening process.<sup>384</sup> The ABA proposed that the service judge advocates general and designated subordinates choose court-martial panel members.<sup>385</sup> Professor Morgan, the principal drafter of the UCMJ legislation,<sup>386</sup> responded that it would be "impracticable" and "unthinkable" to allow the judge advocate general to tell commanding officers to whom to assign court-martial duties.<sup>387</sup> Colonel Frederick Wiener, a noted former Army judge advocate testified:

There is a suggestion on the panel system that has now been watered down. The suggestion is that the Judge Advocate General select the court from the panel. Who selects the panel? The commanding general. Why shouldn't he select the court? In practice, and I speak from experience in four jurisdictions, the court is picked by the staff of the Judge Advocate General. He finds out who is available and he knows the officers at headquarters who have the experience and who have the proper judicial temperament, which the Fourth Article of War requires, and he tries to get the ablest and most experienced people possible.<sup>388</sup>

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382. See Cox, *supra* note 261; Terry W. Brown, *The Crowder-Ansell Dispute: The Emergence of General Samuel T. Ansell*, 35 MIL. L. REV. 1 (1967); Frederick B. Wiener, *The Seamy Side of the World War I Court-Martial Controversy*, 123 MIL. L. REV. 109 (1969).

383. See *infra* note 433.

384. See *Uniform Code of Military Justice: Hearings on H.R. 2498 Before Subcomm. No. 1 of the House Comm. on Armed Services*, 81st Cong. 730-31 (1949) [hereinafter *Hearings on H.R. 2498*] (Report of the American Bar Association Special Committee on Military Justice).

385. *Id.* at 717-23. Mr. Spiegelberg, the chairman of the ABA special committee, cited a report that sixteen of forty-nine general officers "affirmatively and proudly testified that they influenced their courts." *Id.* at 719.

386. Secretary of Defense James Forrestal appointed Harvard Law Professor Edmund Morgan to chair the committee to draft the UCMJ legislation. See GENEROUS, *supra* note 261, at 34-53.

387. *Hearings on H.R. 2498, supra* note 384, at 723.

388. *Id.* at 782-83 (statement of Colonel Frederick B. Wiener).

The UCMJ contained notable reforms in military justice,<sup>389</sup> but Congress rejected the ABA recommendation.<sup>390</sup> The tenets of the discipline paradigm survived.

Colonel Samuel Hays' 1970 remarks at the Conference on Human Rights of the Man in Uniform capture the discipline paradigm of military justice.

The primary objective of the system of military justice must always be to maintain discipline within the organization and to ensure prompt compliance with its dictates . . . . *[I]t must be focused more on producing organizational effectiveness than on punishing or protecting individual action* . . . . [It] must act as a deterrent to undesirable behavior and an instrument to reinforce organizational standards and command control.<sup>391</sup>

More than a quarter century later, the military adheres fully to Colonel Hays' sentiment. In *United States v. Solis*,<sup>392</sup> the CAAF recently stated

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389. See *supra* notes 261,263,265-267. See also *infra* note 433.

390. During the debates on the Military Justice Act of 1983 (Pub. L. No. 98-209, 97 Stat. 1393), a proposal to remove the convening authority from the member selection process was again submitted. See *Military Justice Act of 1982: Hearings on S. 2521 Before the Subcomm. on Manpower and Personnel of the Senate Comm. On Armed Services*, 97th Cong. 277-89 (1982) (statement of Steven S. Honigman, Chairman of the Committee on Military Justice and Military Affairs of the Association of the Bar of the City of New York).

[T]he commander should be relieved of an additional administrative burden, that of the personal selection of members of the courts-martial jury under article 25(d)(2). Perhaps no other element of the uniform code contributes to the perception and possibly at times the reality of unfairness as the fact that the same commander who personally decides to invoke the military justice system also selects the jurors who determine guilt or innocence and impose the sentence.

This spectre of command influence over courts-martial proceedings should be eliminated. In its place we recommend that members of the courts-martial be chosen at random from a pool of eligible individuals.

*Id.* at 278.

391. Colonel Samuel H. Hays, Remarks at the Conference on Human Rights of the Man in Uniform (Mar. 1970), *quoted in* CONSCIENCE AND COMMAND 5 (James Finn ed. 1971) (emphasis added). Colonel Hays was formerly a professor in the Office of Military Psychology and Leadership, U.S. Military Academy.

that “[t]he primary purpose of military criminal law—to maintain morale, good order, and discipline—has no parallel in civilian criminal law.”<sup>393</sup>

*b. The Fallacies of the Discipline Paradigm*

The discipline paradigm ignores a fundamental axiom: a court-martial system based in justice enhances discipline by fostering a greater sense of fairness.<sup>394</sup> The paradigm fails to account for the substantial overlap between justice and discipline. Each includes a fair measure of the other. If all else is equal, when justice is maximized, so is discipline. The obedience, morale, and esprit de corps of individual service members and of the military unit increase when trials by court-martial reach just results, are perceived to be just, and are observed to have been reached by just procedure.

Arguing that the focus or goal of military justice should be discipline *rather than* justice is nonsensical. They are inextricably intertwined. The Ansell-Crowder dispute was *irrelevant*. The question is not whether military justice should be a slave to discipline or a vehicle for the vindication of individual rights. Military justice, like running a motor pool, conducting close order drill, or training an infantry battalion, has a mission. If done properly, it enhances discipline. If done poorly, it detracts from discipline. Like those other activities, it is a mistake to declare its primary purpose to be the maintenance of discipline. Its primary purpose should be the accomplishment of its own mission, in this case maximizing justice, and good discipline will follow.<sup>395</sup> The military maximizes justice not when it seeks exception from constitutional principles, but when it seeks to *exceed* them.

A humorous expression sometimes appears on the walls of military office spaces or passageways: “The beatings will continue until morale improves.” This simple phrase bluntly but eloquently captures the absurdity of the idea that discipline can be advanced *despite* justice. Colonel Hays got it backwards. His call to look first to “organizational effectiveness” rather than “punishing or protecting individual action” is a call to

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392. 46 M.J. 31 (1997) (holding that the “exculpatory no” doctrine does not apply to the military offense of false official statement under Article 107 of the UCMJ).

393. *Id.* at 34.

394. “[G]ood justice never has had a bad effect on discipline. Discipline delivers the accused for trial; justice takes over the trial for possible punishment.” Fedele, *supra* note 343, at 150.

anarchy. It ignores the fact that the organization is nothing more than the individuals who comprise it. If individual action is not appropriately punished or protected first, "organizational effectiveness" is *at least* decreased, if not destroyed.

In 1955, the Supreme Court, in *United States ex rel. Toth v. Quarles*,<sup>396</sup> attempted to justify decreased measures of justice in the armed forces. The Court stated that "trial of soldiers to *maintain discipline* is merely incidental to an army's primary fighting function. To the extent that those responsible for performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not *served*."<sup>397</sup> This language highlights the illogic of the discipline paradigm. Apparently, discipline is important enough to the func-

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395. General William Westmoreland, Chief of Staff of the Army during the Vietnam era, wrote:

[J]ustice should [not] be meted out by the commander who refers a case to trial or by anyone not duly constituted to fill a judicial role. A military trial should not have a dual function as an instrument of discipline and as an instrument of justice. It should be an instrument of justice, and in fulfilling this role, it will promote discipline. The protection of individual human rights is more than ever a central issue within our society today. An effective system of military justice, therefore, must provide of necessity practical checks and balances to assure protection of the rights of individuals. It must prevent abuses of punitive powers, and it should promote the confidence of military personnel and the general public in its overall fairness.

William Westmoreland, *Military Justice—A Commander's Viewpoint*, 10 AM. CRIM. L. REV. 5, 8 (1971).

[I]t seems too clear for argument that courts-martial are criminal courts, possessing penal jurisdiction exclusively and performing a strictly judicial function in enforcing a penal code and applying highly punitive sanctions.

... As the civil judiciary is free from the control of the executive, so the military judiciary should be untrammelled and uncontrolled in the exercise of its function by the power of military command.

... The court-martial can no longer be regarded as a mere instrument for the enforcement of discipline.

Fedele, *supra* note 343, at 148-50.

396. 350 U.S. 11 (1955).

397. *Id.* at 17.

tioning of the armed forces to limit the constitutional rights of its members. Further, according to the discipline paradigm, the primary function of military justice is to maintain discipline. If this is true, "trial of soldiers to maintain discipline" cannot be considered "merely incidental."

Forty years later, the CAAF demonstrated equally illogical reasoning in *Solis*. Maintenance of morale, good order, and discipline, though perhaps characterized as public safety, order, and deterrence, are very much primary purposes of civilian criminal law. Ultimately, military justice serves military discipline just like civilian justice serves civilian order.

Since *Milligan*, the courts have continued to appreciate the simple logic that the efficiency of the armed services depends on discipline. Repeatedly, the Supreme Court has used the military's need for discipline to limit various constitutional rights of service members.<sup>398</sup> Even subscribing fully to the discipline paradigm, however, the model proposed by this article survives analysis under the frameworks adopted by the Supreme Court and military courts to balance individual rights against military necessity.

### *c. Balancing Individual Rights and Military Necessity*

In *Middendorf v. Henry*,<sup>399</sup> the Supreme Court held that summary courts-martial were not "criminal prosecutions" within the meaning of the Sixth Amendment.<sup>400</sup> They found the constitutional right to counsel inapplicable to such proceedings.<sup>401</sup> The Court reached this result by balancing the competing interests. "[W]hether this process embodies a right to counsel depends upon an analysis of the interests of the individual and those of the regime to which he is subject."<sup>402</sup> In *Schlesinger v. Councilman*,<sup>403</sup> the Court held that federal courts may not interfere in pending or ongoing courts-martial and similarly balanced the interests involved.<sup>404</sup> The Court stated that "[i]n enacting the [UCMJ], Congress attempted to balance these military necessities [levels of respect for duty and discipline foreign to civilian life] against the equally significant interest of ensuring fairness to

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398. *See supra* notes 119, 121.

399. 425 U.S. 25 (1976).

400. *Id.* at 33.

401. *Id.* at 48.

402. *Id.* at 43.

403. 420 U.S. 738 (1975).

404. *Id.* at 757-58.



servicemen charged with military offenses, and to formulate a mechanism by which these often competing interests can be adjusted.”<sup>405</sup>

Application of the Fourth Amendment in the military involves similar balancing. In *United States v. Ezell*,<sup>406</sup> the COMA noted that “[i]t is now settled that the protections of the Fourth Amendment and, indeed, the entire Bill of Rights, are applicable to . . . military [personnel] unless expressly or by necessary implication they are made inapplicable.”<sup>407</sup> “This is not to say, however, that in its application the Fourth Amendment

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405. *Id.* In *Goldman v. Weinberger*, an Air Force officer who desired to wear a yarmulke with his uniform brought a First Amendment free exercise of religion challenge against the Air Force’s prohibition against wearing unauthorized headgear. 475 U.S. 503 (1986). In upholding the Air Force regulation, the Supreme Court held that “when evaluating whether military needs justify a particular restriction on religiously motivated conduct, courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.” *Id.* at 507. In *Brown v. Cline*, the Court upheld military restrictions on the rights of service members to circulate petitions on base. 444 U.S. 348 (1980). “We [have] recognized that a base commander may prevent the circulation of material that he determines to be a clear threat to the readiness of his troops.” *Id.* at 354 (citation omitted). The *Brown* Court further stated:

Since a commander is charged with maintaining morale, discipline, and readiness, he must have authority over the distribution of materials that could affect adversely these essential attributes of an effective military force . . . . Because the right to command and the duty to obey ordinarily must go unquestioned, this Court long ago recognized that the military must possess substantial discretion over its internal discipline.

*Id.* at 356.

While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.

*Parker v. Levy*, 417 U.S. 733, 758 (1974).

406. 6 M.J. 307 (C.M.A. 1979) (holding that military commanders are not per se disqualified from authorizing searches, but that they must truly be neutral and detached in doing so).

407. *Id.* at 313 (citing *Bums v. Wilson*, 346 U.S. 137 (1953); *United States v. Jacoby*, 29 C.M.R. 244 (C.M.A. 1960)).

does not take into account the exigencies of military necessity and unique conditions that may exist within the military society.”<sup>408</sup>

The *Middendorf* Court balanced the interests of the military in keeping discipline simple and expedient against the interests of the accused in just treatment. Discussing first the “military necessity” prong, the Court examined the effect of providing defense counsel at summary courts-martial.<sup>409</sup> The Court reasoned that providing a trained attorney to represent an accused in this forum would entice the government to provide the same for itself.<sup>410</sup> The Court noted that the assigned lawyers would represent their clients zealously according to profession and disposition.<sup>411</sup> The Court concluded that “presence of counsel will turn a brief, informal, [quickly convened] hearing . . . into an attenuated proceeding consum[ing] the resources of the military to a degree . . . beyond what is warranted by the relative insignificance of the offenses being tried.”<sup>412</sup> Turning to the interests of the service member, the Court noted that, in addition to the lesser significance of the forum, an accused can always invoke his right to counsel by refusing a summary court-martial.<sup>413</sup> *Middendorf* is a particularly appropriate case for examining the Court’s balancing procedure. The concern there, as with court-martial panel member selection, was an important Sixth Amendment right of criminal due process.

What is the result then of balancing, in the context of the proposed model, the individual’s right to trial by jury against the military’s need for discipline? On the discipline side of the scales, the potential does not exist here for transforming a brief or informal hearing into a lengthy or formal process. The formality of the process is unaffected, and the proposed model likely *increases* efficiency. Considering nothing else, dispensing with juries altogether *would* result in “swifter modes of trial.” Likewise,

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408. *United States v. Middleton*, 10 M.J. 123, 127 (C.M.A. 1981) (holding that traditional military inspection, so long as it is reasonable under the circumstances, vitiates expectations of privacy in the area inspected).

409. *Middendorf v. Henry*, 425 U.S. 25, 45 (1976).

410. *Id.*

411. *Id.*

412. *Id.* The Court pointed out that the maximum punishment of one month confinement at a summary court-martial ~~was~~ substantially less than the *minimum* authorized punishment in some juvenile cases, for which no right to counsel attaches. *Id.* at 46 n.22.

dispensing with counsel, probable cause requirements, and the right against self-incrimination would increase the speed of trial.

The military accused has always enjoyed the right to a panel of military members. Therefore, the question is narrowed. Can military trials be swift enough if the members are "indifferently chosen and superior to all suspicion," as required by *Duncan v. Louisiana*?<sup>414</sup> Will military trials be swift enough if the members are chosen from "the fair cross-section . . . fundamental to the jury trial guaranteed by the Sixth Amendment," according to *Taylor v. Louisiana*?<sup>415</sup> The model proposed by this article is based on computer database. Panel selection should be faster than the current manual analysis and administration inherent to Article 25. More importantly, the database would be administered by personnel who do database

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413. *Id.* "No person with respect to whom summary courts-martial have jurisdiction may be brought to trial before a summary court-martial if he objects thereto . . ." UCMJ art. 20 (West 1995). "The accused has the right to be represented in his defense before a general or special court-martial by civilian counsel if provided by him, or by military counsel of his own selection if reasonably available, or by the defense counsel detailed under . . . this title." *Id.* art. 38(b). In *Goldman v. Weinberger*, the Court seemed to adopt a rational basis test for this balancing involving First Amendment rights. 475 U.S. at 508. The Court first recognized the military need to diminish individuality in favor of group identification and accomplishment of mission. "Uniforms encourage a sense of hierarchical unity by tending to eliminate outward individual distinctions except for those of rank." *Id.* The Court noted that the Air Force uniform regulations were strict, but allowed for some exceptions. *Id.* at 508-09. Religious headgear could be worn during indoor ceremonies, and religious apparel could be worn in designated living quarters. *Id.* Goldman argued that his free exercise of religion in wearing an "unobtrusive" yarmulke did not create a "clear danger" of undermining discipline and might even increase morale by making the Air Force a more "humane place." *Id.* at 509. The Court found that the Air Force perceived a need for uniformity that was not overcome by the First Amendment. *Id.* at 509-10.

Quite obviously, to the extent the regulations do not permit the wearing of religious apparel . . . military life may be more objectionable for petitioner and probably others. But the First Amendment does not require the military to accommodate such practices in the face of its view that they would detract from the uniformity sought by the dress regulations. The Air Force has drawn the line essentially between religious apparel that is visible and that which is not, and we hold that those portions of the regulations challenged here reasonably and evenhandedly regulate dress in the interest of the military's perceived need for uniformity.

*Id.*

414. 391 U.S. 145, 151-52 (1968).

415. 419 U.S. 522, 530 (1975).

administration. They will (hopefully) know how to accomplish their mission. The convening authority and his all-too-numerous member selection assistants can worry about winning the nation's battles instead of where they can find a female to sit on the next sex case.<sup>416</sup>

From the standpoint of member availability under the proposed model, convening authorities share the burden of providing members, and the base of personnel from which members are drawn is much broader. The disruption to the operations of all commands should be decreased. Additionally, there are numerous intangible benefits related to increased fairness and the perception (within and without the military) of increased fairness.

On the individual's side of the scales, unlike *Middendorf*; the accused is not offered the choice to "invoke" his right to a trial by jury by opting for a higher forum. Further, as pointed out in *Duncan* and *Taylor*, the accused will enjoy, under the model, a right that is fundamental to all other Americans. The accused will enjoy one of the particularly important rights as analyzed in *United States v. Culp*.<sup>417</sup>

One further very legitimate question, which addresses a broader analogy than *Middendorf* alone, must be answered. Why not treat Sixth Amendment application like First and Fourth Amendment application? The military accused has always had a right to a panel of members, albeit chosen by the convening authority. So, the military accused receives his Sixth Amendment right to trial by jury; however, like these other provisions of the Bill of Rights, exigencies of duty and discipline place certain limits on its application. There are two compelling rejoinders.

First, unlike the unrestricted application of First and Fourth Amendment rights to the military, unfettered Sixth Amendment application would not produce tangible or identifiable detrimental effects on duty and discipline. The discipline paradigm works well and finds strong justification in matters that relate to First Amendment (uniformity of appearance, respect, and obedience to orders) and Fourth Amendment (barracks and personal hygiene, safety, health, and welfare) jurisprudence. The paradigm breaks down, however, in matters that relate to criminal due process inside the courtroom (Sixth Amendment rights to counsel, confrontation, compulsory process, and speedy trial by jury and Fifth Amendment rights to due

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416. See *supra* text accompanying notes 204-214.

417. 33 C.M.R. 411 (C.M.A. 1963).

process and against self-incrimination). One cannot easily discern adverse consequences to duty and discipline from the full measure invocation of these fundamental rights at trial.

Second, the Sixth Amendment right to trial by jury, as recent case law interprets it and recent legislation implements it, is a fundamentally more important constitutional right. The jury, “indifferently chosen” from “the fair cross-section” of the community, decides the ultimate question of guilt or innocence and, in the military, imposes punishment. Invoked at an obviously critical stage of the proceedings, the right to a jury is much more analogous to the right to counsel than the right to freedom from unreasonable search. Where the latter implicates evidentiary exclusionary rules, the former bears on the decision to convict or to acquit. Though the full meaning of the Sixth Amendment right to trial by jury has evolved, the constitutional framers recognized a greater relative value to the right.

This article generally defies the discipline paradigm of military justice to justify cogently a military exception to the Sixth Amendment. Even when subjected to the contemporary paradigm analysis, however, the model proposed in this article survives scrutiny. On the other hand, the model is not a perfect match with constitutional standards.

#### 4. Departure of the Model from Constitutional Standards

##### a. The Seniority Requirement

The proposed model retains one aspect of discipline that is antithetical to the constitutional scheme. The military accused would be tried by members who are senior to, or of the same rank as, the accused. The military depends on its hierarchical structure to maintain its required discipline. Corporals and Sergeants should not sit in judgment of First Sergeants or First Lieutenants in the courtroom for the same reason they do not sit in judgment of them outside the courtroom.

This raises equal protection concerns. Officers are more likely to be tried by their peers.<sup>418</sup> Juries for junior enlisted accuseds will have been drawn from a much larger cross-section of the community. However, these concerns clash with compelling and tangible harm to institutional discipline in the *Middendorf* balance. If juniors wield the power of judgment

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418. See Remcho, *supra* note 63, at 226-27.

and punishment over seniors in the formal arena of justice, the influence of all seniors is diminished in the less formal day-to-day functioning of the services. A second's hesitation on the battlefield can mean the difference between victory and defeat. That second (or more) may be compromised by the natural deterioration of the military hierarchy should the roles and expectations of service members be so different within military justice from without.

This facet of the model is exemplary of the "separate society" concept addressed earlier in this article.<sup>419</sup> This departure from the constitutional norm is a necessary manifestation of separatism. Article 25 is a complete denial of impartial selection from a fair cross-section of the community. Unlike Article 25, the seniority requirement of this model should not raise concerns of extremism. It should not generate the poor public perception of military justice that is created by the current method of "district attorney" juror selection.<sup>420</sup>

#### *b. Rank-Group Restriction on Pure Randomness*

Random selection is a means to achieve the constitutionally required fair cross-section.<sup>421</sup> The military's structure is uniquely hierarchical (few commanding many), and the installation venire pools are relatively small. Between individual cases, pure random selection would lead to inconsistent achievement of a fair cross-section based on rank, age, and related factors. A private first class (E-2) would be statistically likely to face a jury of all E-2s and E-3s. Though unlikely, an E-2 might face a panel of all lieutenant colonels (O-5s), however.

This model encourages younger and more junior juries than are currently impaneled under Article 25. The rank-group restriction on the model prevents that tendency from operating so drastically as to vitiate the fair cross-section principle in individual cases. Although the rank-group restriction deviates from constitutional norms, it upholds constitutional principles for the government and each accused service member.

Further, unlike purposefully engineering a jury to achieve proportional race or gender representation, members who are selected under this

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419. See *supra* notes 327-330 and accompanying text.

420. See *supra* note 343 and accompanying text.

421. See *supra* §§ 1a, 1b.

model are unlikely to view themselves as advocates or voting blocks for a particular cognizable group. Again, it is a deviation that is required by the military "separate society," and observers are likely to understand and to applaud it.

### *c. Overseas and Deployed Courts-Martial*

Many service members will be tried overseas due to permanent assignment there, and others will be tried during deployment or while at sea. Generally, overseas venire pools will contain fewer reserve personnel than will venire pools in the United States. The overseas accused may fairly raise Fifth Amendment equal protection and Sixth Amendment challenges to the proposed model on this basis. One way to compensate might be to include Department of Defense civilian employees in the overseas venire pools. Another way might be to consolidate overseas trials in a few locations where and when reserve personnel would be available.

Even uncompensated, this deviation is one of understandable scope. The military must be deployed worldwide, and it must have military justice capability worldwide. Additionally, the deviation is minimal. As discussed above, reserve personnel are included in the venire pool largely to help achieve the benefit of cross-sectional representation related to broader based community norms. Assuming that the military could afford to ship reserve personnel around the world to sit on overseas courts-martial, this benefit would be unrealized. Likewise, civilian appreciation of military justice and civilian control of the military are goals that are furthered by the model as an institution, not by individual cases. Finally, the fair cross-section requirement stems from an appreciation of cognizable differences in race, gender, religion, and other congenital distinctions.<sup>422</sup> Difference in military component is hardly a distinction worth mentioning next to these characteristics.

## *5. Positive Aspects of Article 25?*

By abandoning the criteria set forth in Article 25, the military loses some measure of what would be considered in any other endeavor to be quality control. There is nothing overtly sinister about the criteria themselves. Maximizing experience and judicial temperament, for example,

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<sup>422</sup>. See *supra* notes 39, 181 and accompanying text.

might always be a good thing. There are two problems, however. First, the criteria are not applied and maximized by an impartial entity. Instead, they are applied by people, with their own inherent biases. In the case of the military, they are applied by the same individual who initiates the prosecution. Second, maximizing the criteria, even if it could be accomplished objectively, fails to account for the accepted nature of the jury trial. The most experienced, most educated, and best-trained mechanic is the one who should be working on military trucks. The endeavor of justice, however, is different. Decisions of juries are not to represent the elite, but the broad spectrum of society, as represented by Chesterton's twelve ordinary men.<sup>423</sup>

The words of Richard Henry Lee at the Virginia state convention to ratify the federal Constitution extol the values of representative juries in a free democracy.

It is essential in every free country that common people should have a part and share of influence in the judicial as well as in the legislative department.

...

The trial by jury in the judicial department, and the collection of the people by their representatives in the legislature, are those fortunate inventions which have procured for them, in this country, their true proportion of influence, and the wisest and most fit means of protecting themselves in the community. Their situation as jurors and representatives, enables them to acquire information and knowledge in the affairs and government of society; and to come forward, in turn, as the centinels[sic] and guardians of each other.<sup>424</sup>

At first blush, these eloquent sentiments appear antithetical to the effective functioning of a military organization. Why would the military want its functional equivalent of the common people—the privates, specialists, and corporals—sharing in any influence of the military's hierar-

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423. See *supra* note 245; VAN DYKE, *supra* note 245, at 13.

424. Richard Henry Lee, Letter IV, Oct. 12, 1787, *reprinted in* PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787-1788, at 316 (Paul L. Ford ed., Da Capo Press 1968) (1888). See John Henry Wigmore, *A Program for the Trial of Jury Trial*, 12 J. A.M. JUDICATURE SOC'Y 166, 171 (1929) ("[J]ury-duty will bring all respectable citizens sooner or later to have acquaintance with court methods, and in such a way as to compel serious thought and give the needed scrap of judiciary education common to all.").



chical structure, which is designed to exact complete and immediate obedience, respect, and thereby mission accomplishment? However, Lee's last sentence is directly applicable to the military context. The privates, specialists, and corporals will someday be sergeants and sergeants major. Their participation in the process of criminal justice in the military allows them not only "to acquire information and knowledge in the affairs and government" of the military, but also to assume a real and tangible stake in those affairs. Their ability to assume roles later as "[s]entinels and guardians of each other," exactly what the military wants, is enhanced.

Lee's words capture part of the concept of increased discipline in the armed forces through increased justice. Let the senior officers and enlisted personnel take a lesser role in the administration of justice. Hand the reins of justice, which are inevitably hitched to the horses of discipline, over to the personnel who are most affected by their manipulation. A fair cross-section will not—and, of course, should not—exclude the influence of the senior and the experienced. Indeed, the military system of justice contemplates that they will be mentors in the deliberation room, as they are in the field. However, a fair cross-section will dramatically build the knowledge of, increase the accountability of, and enhance the discipline of the military's *future mentors*.<sup>425</sup>

Proponents of selection criteria see no conflict between representativeness and juror qualifications. Former North Carolina Senator Sam Ervin believed that jurors, who are representative of the community, must also be sufficiently intelligent to understand the issues placed before them.<sup>426</sup> He believed that the fair cross-section requirement was improper because it highlighted that society is made up of *classes*.<sup>427</sup> He believed that it indicated that there is one truth for one class and another for a different *class*.<sup>428</sup> However, the arguably objective criterion of intelligence—like the related Article 25 criteria—adds nothing to the pursuit of justice from the perspectives of the accused and society. As noted by former Attorney General Ramsey Clark while debating in Congress with Senator Ervin over the 1968 Jury Selection Act:

The defendant has to have confidence, as does society, in [the jurors'] absolute impartiality, and if some particular intelligence

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425. See *supra* note 222 and accompanying text.

426. See Sam J. Ervin, Jr., *Jury Reform Needs More Thought*, 53 A.B.A.J. 132, 134 (1967).

427. See *id.*

428. See *id.*

test is used, it necessarily will reflect preferences and prejudices. However hard the testing person might have tried to be selective, he will only represent his own point of view and the person standing trial might be prejudiced.<sup>429</sup>

Judge Walter Gewin, who served on the federal judiciary's Committee on the Operation of the Jury System, put it most cogently.

[C]areful study has given support to the opinions of some scholars that the so-called blue ribbon jury is not superior to the one chosen by random selection. This is so because the indispensable faculty for good jury service is *judgment*, an inherent mental quality which does not perforce coincide with superior intelligence.<sup>430</sup>

History and experience have taught that, with justice (unlike running a motor pool, close order drill, or training an infantry battalion), the decision-makers themselves need not be the experts. The pursuit and perception of fairness require that they not be the experts. In fact, "expert fact-finders" is an illusory concept. Yet, unappreciative of the differences between military justice and fixing a truck, the military goes about in search of "expert fact-finders" with the criteria of Article 25.

Finally, appreciation of "human nature and the ways of the world,"<sup>431</sup> is collective. It comprises the individual experiences — some lengthy,

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429. *Hearings on S. 1319, supra* note 260, at 49 (statement of Ramsey Clark, Attorney General of the United States).

430. Walter Gewin, *The Jury Selection and Service Act of 1968: Implementation in the Fifth Circuit Court of Appeals*, 20 MERCER L. REV. 349-50 (1969).

431. The closing substantive instructions on findings given to the court-martial members by the military judge include the following sentences:

You should bear in mind that only matters properly before the court as a whole should be considered. In weighing and evaluating the evidence, you are expected to utilize your own common sense, your knowledge of human nature and the ways of the world. In light of all the circumstances in the case, you should consider the inherent probability or improbability of the evidence . . . . The final determination as to the weight or significance of the evidence and the credibility of the witnesses in this case rests solely upon you.

some not, but all different—of each juror. Those who would argue for a minimum level of juror education, experience, or intelligence, so that the jury will appreciate the complex facts and issues presented in today's courtrooms, misunderstand the roles of jurors and attorneys in an adversarial system. The uneducated or unintelligent *advocate* dumps complex facts and issues at the feet of the jury and expects the jury to find the right answer. That advocate, who is, unfortunately, joined by a public that is privy only to the result, later complains that the unintelligent jury failed to reach the right answer. If the facts and issues of a case are complex, it is the attorney's role, in a system that is grounded in the presumption of innocence and proof beyond a reasonable doubt, to make them understandable. The attorney has all of the tools necessary to do so, but one of them should not be the built-in education or experience of the fact-finder, who is otherwise presumed to be a clean slate.

## V. Conclusion

The inexorable "civilianization of military law"<sup>432</sup> imports into military justice more and more features of traditional civilian justice.<sup>433</sup> Indeed, in many respects, military justice exceeds the expectations of traditional civilian justice.<sup>434</sup> Even within the ambit of the Sixth Amendment, military law provides greater due process than many civilian jurisdictions. The military allows an accused who is appearing even in its misdemeanor forum—special court-martial—to request a jury.<sup>435</sup> The Supreme Court has long since denied a jury trial, as a matter of right, to civilians who face misdemeanor punishment.<sup>436</sup> In the military, everyone who is accused of a crime, or who is otherwise entitled to counsel, gets a lawyer, often the lawyer of his choice.<sup>437</sup> In every civilian jurisdiction, by contrast, indigence is the only ticket to counsel as a matter of entitlement. Yet, the military clings stubbornly to one old vestige of criminal practice that is entirely foreign to civilians, foreign to the Constitution, and foreign to fundamental fairness and its appearance—jury selection by the sovereign.

The right to trial by a jury that is impartially constituted from a fair cross-section of society is fundamentally important to the American system of justice. *Ex parte Milligan* and *Ex parte Quirin* wrongly decided that the American service member could not partake of it. Those cases improperly analyzed the constitutional and historical underpinnings of the right to

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432. Edward F. Sherman, *The Civilianization of Military Law*, 22 ME. L. REV. 3 (1970).

trial by jury and its application to the military. The Supreme Court developed the constitutional standard of the Sixth Amendment, impartial jury selection from a fair cross-section of society, in the late 1960s. The courts began to recognize that the Bill of Rights applies to the military at roughly the same time. The scope of military criminal jurisdiction reached its currently widest sweep barely over a decade ago. Yet, courts continue blindly to rely on *Milligan* and *Quirin* and their poorly reasoned conclusion, which

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433. The 1806 amendments to the Articles of War presumed the accused innocent if he remained silent, allowed the accused to challenge members, prohibited double jeopardy, and established a two-year statute of limitations. *See* Articles of War of 1806, arts. 70, 71, 87, 88, *reprinted in* WINTHROP, *supra* note 81, at 982-83; SCHLEUTER, *supra* note 81, § 1-6(B). *See also supra* note 183 and accompanying text. In 1863, Congress permitted the accused to seek a continuance. *See* Act of Mar. 3, 1863, ch. 75, § 29, 12 Stat. 731, 736; SCHLEUTER, *supra* note 81, § 1-6(B). In 1920, Congress revised the Articles of War to provide for swearing of charges, assignment of defense counsel, pre-trial investigation, rulings on the admissibility of evidence at trial by a law member, and court-martial boards of review. *See* Articles of War of 1920, *reprinted in* 1921 MANUAL, *supra* note 8, app. 1; GENEROUS, *supra* note 261, at 10. The Elston Act, which incorporated a change that was recommended by the ABA, amended the Articles of War to provide for enlisted membership on court-martial panels. *See* Articles of War of 1948, art. 4, *reprinted in* 1949 MANUAL, *supra* note 264, app. 1, at 275-76. The UCMJ replaced the law member with a non-voting certified attorney law officer, who functioned more like a judge than an advisor. *See* UCMJ art. 26 (1950) (amended 1968, 1983). It established civilian appellate review of courts-martial in the COMA. *See id.* art. 67. The Military Justice Act of 1968 replaced the law officer with a military judge and provided for trial by military judge alone at both the special and general court-martial. *See* Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335. *See also* UCMJ art. 16 (1958) (amended 1968, 1983); *id.* art. 26 (amended 1968, 1983). The act expressly forbade the convening authority from evaluating the military judge or criticizing defense counsel. *See* 82 Stat. 1335. *See also supra* note 267. In 1980, the President promulgated for courts-martial the Military Rules of Evidence, which were virtually identical to the Federal Rules of Evidence. *See* Exec. Order No. 12,198, 3 C.F.R. 151 (1980). The Military Justice Act of 1983 provided for Supreme Court review of COMA decisions and purported to assert increased subject matter jurisdiction of courts-martial. *See* Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393; UCMJ art. 67a (1984).

434. The pretrial investigation, mandated under Article 32 of the UCMJ for felony prosecutions in the military, provides far greater due process to the accused than the civilian grand jury process. *See* UCMJ art. 32 (West 1995); MCM, *supra* note 5, R.C.M. 405. Post-trial and appellate review are far more comprehensive in military justice than in the civilian system. *See id.* R.C.M. 1101-1210.

435. MCM, *supra* note 5, R.C.M. 903.

436. *See supra* notes 33-34 and accompanying text.

437. *See* UCMJ arts. 27, 38 (West 1995).

was reached upon facts of no moment today. In doing so, the courts withhold a fundamental right of criminal due process.

The concept of separation of powers lies at the root of the United States governmental structure. The rejection of trial by jury in the military disserves that concept on several levels. Article I powers have speculative relation to the procedural and substantive individual rights of the military accused. Yet, courts have construed these powers to eclipse clearly and broadly stated Article III concepts that are on point. Those in whom prosecutorial discretion is vested, the agents of the executive, select the trial jury.

Donald L. Burnett, Jr., Dean of Brandeis School of Law, recently delivered a lecture to the students and faculty of The Army Judge Advocate General's School, **U.S. Army**.<sup>438</sup> His inspiring words on upholding the values of the legal profession included a tribute to the concept of separation of powers. Embodied in the American "charter" of government, which was created at that "turning point in history" when the constitutional convention met in **1787**, the principle lies at the heart of the legal profession's **values**.<sup>439</sup> Dean Burnett asked whether a judiciary that is controlled by the political branches would ever have upheld equal protection on the basis of race or gender. He asked if such a judiciary would have ensured that every criminally accused enjoys his Sixth Amendment right to counsel.<sup>440</sup> Courts and the military have affirmatively precluded every criminally accused from enjoying the Sixth Amendment right to a jury. Does the military system of jury selection uphold today the concepts of justice that are central to the American "charter" of **government**?<sup>441</sup> The rest of

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438. Donald L. Burnett, Jr., The Twenty-Second Edward Hamilton Young Lecture delivered to The Judge Advocate General's School, U.S. Army (Feb. 26, 1998) (transcript available at the Judge Advocate General's School, U.S. Army, Charlottesville, Va.).

439. *Id.*

440. *Id.*

441. Author Jon Van Dyke stated that:

The jury is the embodiment of the realization that only by gathering together persons from all sectors of society, presenting the evidence in a controversy to them, and asking them to deliberate on the issues involved can we be sure that all relevant perspectives have been considered and that the verdict represents the community's collective judgment on the controversy.

the free world has asked that question of themselves and their charters; their answers resound from Europe and Canada: "no."

Command influence is a necessary byproduct of command selection of jurors. Where apparent, court stacking or command interference with ongoing courts is devastating to the fairness of the individual case and the appearance of fairness in the entire system. Where it is not apparent, the public suspects it. Remarkably, cases like *Youngblood*, which features the convening authority and his staff judge advocate overtly suggesting threats to the lenient, are alive and well. Cases like *Swagger*, where the convening authority appointed his installation provost marshal to the panel, continue to reflect the vitality of the problem.

The need for discipline in the armed forces is crucial and may justify significant departure from some constitutional norms that are familiar to civilians. However, courts and the military have lost sight of the coexistence of discipline and justice. It is assumed that discipline is enhanced by restricting justice under the Sixth Amendment. Judges, legislators, and military leaders are blinded to the opposite conclusion, that heightened discipline is obtained through heightened justice.

The military services offer uniquely fertile potential for implementing constitutional standards of jury selection. In what other jurisdiction can the entire population actually serve as the venire pool? In what other jurisdiction does the removal of the juror from her regular duties have less potential impact? In what other jurisdiction can a computer database truly generate a fair cross-section of society for every trial? Whether or not the House of Representatives is soon joined by the Senate in requesting a plan for random selection of military juries, computer database venire pools, as proposed by this article, should replace jury selection by the sovereign extant under Article 25. By using the model proposed in this article, the military will satisfy constitutional standards of criminal due process and will drastically curtail unlawful command influence, and discipline *will improve*.

He puts not off the citizen when he enters the camp; but it is because he is a citizen, and would wish to continue so, that he makes himself for a while a soldier.

— Justice Sir William Blackstone<sup>442</sup>

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442. 1 BLACKSTONE, *supra* note 3, at \*408.

For the **jury** system is the handmaid of freedom. It catches and takes on the spirit of liberty, and **grows** and expands with the progress of constitutional government.

—Charles S. May<sup>443</sup>

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443. Charles S. May, Commencement Address **to** the University of Michigan Law School (Mar. 1875), *in* J. W. DONOVAN, MODERN JURY TRIALS AND ADVOCATES 165-90 (2d rev. ed., New York, Banks & Brothers 1882).

## ENVIRONMENTAL COMPLIANCE IN CONTINGENCY OPERATIONS: IN SEARCH OF A STANDARD?

MAJOR KAREN V. FAIR<sup>1</sup>

Environmental threats do not heed national borders and can pose long-term dangers to our security and well being . . . . Decisions today regarding the environment and natural resources can affect our security for generations; consequently, our national security planning is incorporating environmental analysis as never before.

— President Clinton's National Security Strategy<sup>2</sup>

Environmental responsibility involves all of us. The environmental ethic must be part of how we live and how we train . . . .

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2. THE WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES (1997) [hereinafter NATIONAL SECURITY STRATEGY OF THE UNITED STATES]. This document is located on the internet at <http://www.dtic.mil>.



By working together, we can forge a premiere Environmental Stewardship Program. Protection of the environment is key to ensuring we can continue to conduct tough, realistic training and keep the Army trained and ready in the future.

—General Dennis Reimer<sup>3</sup>  
Chief of Staff, U.S. Army

## I. Introduction

In November 1992, the secretary and the chief of staff of the Army signed the *United States Army Environmental Strategy into the 21st Century*.<sup>4</sup> The strategy states: "Leadership is the key to success . . . Each of you in the chain of command is responsible for ensuring that the U.S. Army strategy is implemented and that environmental stewardship is an integral part of everything you do."<sup>5</sup> The strategy also directs the Army leadership to instill an environmental ethic—in addition to the warfighting ethic—throughout the force.<sup>6</sup> In the context of multilateral peace operations that are evolving in the current complex international and political world stage, this is a demanding mandate for today's armed forces.

The United Nations Security Council authorized more peacekeeping operations after 1988 than in the preceding forty years.<sup>8</sup> Consequently, since 1990, the National Command Authorities (NCA)<sup>9</sup> have deployed military forces in over twenty-five operations worldwide.<sup>10</sup> The protec-

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3. U.S. DEP'T OF ARMY, WHITE PAPER, INTEGRATING U.S. ARMY ENVIRONMENTAL STRATEGY INTO OPERATIONAL DOCTRINE (25 June 1996) [hereinafter INTEGRATING U.S. ARMY ENVIRONMENTAL STRATEGY] (copy on file with author). This document is located on the internet at [http://www.wood.army.mil/DPEB/IRON/wp2\\_cont.htm](http://www.wood.army.mil/DPEB/IRON/wp2_cont.htm).

4. U.S. DEP'T OF ARMY, UNITED STATES ARMY ENVIRONMENTAL STRATEGY INTO THE 21ST CENTURY (1992) [hereinafter U.S. ARMY ENVIRONMENTAL STRATEGY]. See Brigadier General Joseph G. Garrett III, *The Army and the Environment: Environmental Considerations During Army Operations*, 69 U.S. NAVAL WAR C. INT'L L. STUD. 42, 51-52 (1996) (discussing the integration of the Army's environmental strategy to assure mission accomplishment across the spectrum of operations from war to operations other than war).

5. Garrett, *supra* note 4, 51-52.

6. See *id.*

7. See U.S. DEP'T OF ARMY, FIELD MANUAL 100-23, PEACE OPERATIONS 111 (30 Dec. 1994) [hereinafter FM 100-23]. The current field manual defines peace operations as "[a]n umbrella term that encompasses three types of activities; activities with predominantly diplomatic lead (preventive diplomacy, peacemaking, peace building) and two complementary, predominantly military activities (peace-keeping and peace-enforcement)." *Id.* at 111.

tion of the natural environment during the planning and execution phases of these varied contingency operations must reflect the national security strategy and the Army leadership's vision of environmental stewardship. Despite the best efforts of military planners in the planning and execution of contingency operations, the media microscope can transform an otherwise successful operation into a political failure absent vigilant oversight of the impact of military operations on the environment." Proper staff planning for environmental considerations during contingency operations, accompanied by a standardized environmental package for every military unit that deploys to a world "hot spot" will assist in the successful accomplishment of the operation and will insulate commanders from negative media publicity.

The balance between successfully completing a contingency operation, such as a United Nations sanctioned Chapter VI or Chapter VII multinational force mission, and protecting the environment has become increasingly more demanding since 1992.<sup>12</sup> The failure to navigate successfully through the maze of international law and treaties, domestic statutes, Department of Defense directives, and other assorted service-level regulations can impede the mission, damage international relations, generate negative media coverage, and produce costly environmental claims. A deploying unit's failure to comprehend fully the environmental maze of

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8. See Richard Ziegler, *Ubi Sumus? Quo Vadimus?: Charting the Course of Maritime Interception Operations*, 43 NAVAL L. REV. 1, 3 (1996), citing Jeffrey I. Sands, *Blue Hulls: Multinational Naval Cooperation & The United Nations*, CNA RES. MEMORANDUM 93-40 (Center for Naval Analyses, Alexandria, Va., 1993).

9. The National Command Authorities (NCA) are composed of the President and the secretary of defense. The NCA exercise their power through the chairman of the Joint Chiefs of Staff to the combatant commanders.

10. See COLONEL DAVID L. CARR, U.S. DEP'T OF THE ARMY, WHITE PAPER, CONSIDERATIONS FOR THE DEVELOPMENT OF A DOD ENVIRONMENTAL POLICY FOR OPERATIONS OTHER THAN WAR 14 (30 May 1997). Colonel Carr's report presents the first phase of an environmental policy development project. The project, which is being conducted by the Army Environmental Policy Division, has a threefold purpose: to assess the requirement for a Department of Defense (DOD) environmental policy for MOOTW, to identify key issues involved with this policy initiative; and to provide recommendations for policy development to the deputy assistant secretary of the Army and the deputy undersecretary of defense for environmental security. *Id.*

11. See FM 100-23, *supra* note 7, at 47. The Army field manual on peace operations reminds commanders that "[p]eace operations are carried out under the full glare of public scrutiny . . . . Because reports of peace operations are widely visible to national and international publics, [public affairs] is critical in peace operations. News media reports contribute to the legitimacy of an operation and the achievement of political, diplomatic goals." *Id.*

obligations may result in the commander's personal criminal and/or civil liability.<sup>13</sup> Despite these potential negative consequences and the increased emphasis on environmental protection, there is "no strategic environmental policy, either at the joint or service level, which applies specifically to overseas contingency operations."<sup>14</sup> There are myriad existing environmental laws for peacetime military operations worldwide. Most of these peacetime laws, however, are either inapplicable or are inappropriate for application during overseas military operations other than war (MOOTW).<sup>15</sup>

In light of existing environmental doctrine and guidance, this article analyzes the continuum of recent contingency operations and demonstrates that current doctrine is incomplete, vague, and disjointed. This article then offers proposed solutions to address the legal void for environmental considerations during MOOTW. Part II of this article examines the current legal structure and the analysis that applies to environmental considerations in overseas contingency operations. Part III describes the fluctuating environmental doctrine in recent MOOTW and the current legal void in this area. Part IV focuses on the imminent changes in the area of environmental considerations during MOOTW and how these changes will impact on the combatant commander's discretion and force a new approach to environmental considerations during MOOTW. The final section, Part V, anticipates the impact of these changes on legal

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12. United Nations member states conduct peace operations under Chapters VI and VII of the United Nations Charter. *See* U.N. CHARTER chs. VI, VII. As to United States involvement in these operations:

The United States reserves the right to conduct operations unilaterally in conformance with appropriate international law. In such cases, the United States would organize, equip, and employ its forces consistent with the unique aspects of [chapter VI or VII] of the U.N. Charter. Normally, traditional peacekeeping (PK) involving high levels of consent and strict impartiality are operations authorized under the provisions of Chapter VI of the UN Charter, which discusses the peaceful settlement of disputes . . . . Peace operations with low levels of consent and questionable impartiality are conducted under mandates governed by Chapter VII of the UN Charter. Chapter VII operations are frequently referred to collectively as PE (peace enforcement).

FM 100-23, *supra* note 7, at 1-2.

13. *See* INTERNATIONAL & OP. L. DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA 422, 1997 OPERATIONAL LAW HANDBOOK 5-1 (1997) [hereinafter JA 422].

14. CARR, *supra* note 10, at 10.

15. *See id.*

advisors in the field and on the initiatives that the chairman of the Joint Chiefs of Staff and service-level operators and planners must pursue to integrate environmental considerations into the contingency operation planning and execution processes.

## 11. Current Framework of Environmental Standards Applicable During Overseas MOOTW<sup>16</sup>

Recent contingency operations, such as Operation Joint Endeavor in Bosnia, illustrate the major role that environmental issues can play.<sup>17</sup> Such issues may take even the most seasoned legal advisors by surprise. Many people might mistakenly assume that domestic environmental statutes have no applicability in foreign countries or that military necessity negates or mitigates compliance with environmental law.<sup>18</sup> The critical job for

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16. Deployments for military operations outside the United States are conducted for a wide range of activities. These activities include MOOTW, which focus on deterring war and promoting peace. Overseas MOOTW may include protection of humanitarian assistance, establishment of order and stability, enforcement of sanctions, guarantee and denial of movement, establishment of protected zones, forcible separation of belligerents, disaster relief, nation assistance, and peacekeeping/peacemaking operations pursuant to United Nations security resolutions. Although some military operations are conducted for one purpose, others might have multiple purposes, such as the 1992-1993 Operation Restore Hope deployment in Somalia that escalated from humanitarian assistance to peacekeeping operations and finally culminated in combat operations that resulted in American casualties. See generally JOINT CHIEFS OF STAFF, JOINT PUB. 3-07, JOINT DOCTRINE FOR MILITARY OPERATIONS OTHER THAN WAR (16 June 1995) [hereinafter JOINT PUB. 3-07]; THE JOINT TASK FORCE COMMANDER'S HANDBOOK FOR PEACE OPERATIONS (16 June 1997) [hereinafter JTF HANDBOOK]. The *JTF Handbook*, a relatively recent publication, reflects experience gained in recent peace operations and data provided in current joint doctrine. It is designed as a resource for senior commanders who have been designated or are about to be named as the joint task force commander for peace operations. *Id.* See FM 100-23, *supra* note 7, at iv (incorporating lessons learned from recent peace operations and existing doctrine to provide a framework for doctrinal development in the conduct of peace operations).

17. These issues include, for example: (1) the requirement for the United States to negotiate transit agreements among the European countries in the Bosnian theater to allow the passage of hazardous waste across national borders; (2) the requirement for the United States to pay environmental claims during Operation Joint Endeavor in Bosnia for fuel spills that affect groundwater aquifers; (3) the requirement for the United States, during Operation Joint Endeavor, to pay claims to European farmers for the destruction that track vehicles caused to five to ten years worth of crops due to the inability to understand soil composition adequately. See generally CENTER FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, AFTER ACTION REPORT, OPERATION JOINT ENDEAVOR [hereinafter JOINT ENDEAVOR AAR] (undated and unpublished transcript on file with the Center for Law and Military Operations).

deployed judge advocates is determining which international laws, domestic statutes, Department of Defense directives, service regulations, and host nation laws and policies apply and which do not.<sup>19</sup> An elaborate and complicated statutory and regulatory scheme exists to ensure that the combatant commander, at the very minimum, considers the environmental consequences of contingency operations.

#### A. Executive Order 12,114

Although the National Environmental Policy Act<sup>20</sup> (NEPA) presumptively does not apply extraterritorially,<sup>21</sup> Executive Order (EO) 12,114, *Environmental Effects Abroad of Major Federal Actions*,<sup>22</sup> mandates that the armed forces comply with the spirit and intent of the NEPA during major overseas operations.<sup>23</sup> Executive Order 12,114 requires extensive

18. See Anne L. Burman and Teresa K. Hollingsworth, *JAGs Deployed: Environmental Law Issues*, 42 A.F.L. REV. 19 (1996) (providing an excellent overview of the Air Force judge advocate's role in anticipating and preparing for environmental law issues during contingency operations).

19. *See id.*

20. 42 U.S.C.A. §§ 4321-4370a (West 1998).

21. The National Environmental Policy Act (NEPA) applies to major federal actions located outside the United States that have significant environmental impacts inside the United States. *Id.* The NEPA is a procedural statute that creates documentation requirements to ensure that agency decisionmakers consider the environmental impact of federal actions. The NEPA requires the identification and analysis of potential environmental effects of certain proposed federal actions before those actions are initiated. *Id.* Specifically, it requires that for every legislative proposal or other federal action, federal agencies use a systematic, interdisciplinary approach that evaluates the potential environmental consequences associated with the proposed action and considers alternative courses of actions. *Id.* The required documents are environmental assessments (EAs), environmental impact statements (EISs), or both. These lengthy documents can cause substantial delays in a planned major federal action. To date, no MOOTW has triggered the NEPA. See NEPA Coalition of Japan v. Defense Department, 837 F. Supp. 466 (D.D.C. 1993) (refusing to apply the NEPA overseas due to the strong presumption against extraterritorial application of domestic statutes and the possible adverse effect on treaty relations and U.S. foreign policy). Courts have consistently been unwilling to pierce the sovereignty of other nations with the extraterritorial application of the NEPA. See *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991) (citing *Foley Bros. v. Filardo*, 336 U.S. 281 (1949) (holding that, lacking the affirmative intention of Congress clearly expressed in the statute, the court must presume that it is primarily concerned with domestic concerns). See also *Smith v. United States*, 507 U.S. 197 (1993) (holding that waiver of sovereign immunity must be clearly expressed in statute for the Federal Tort Claims Act to apply extraterritorially).

22. Exec. Order No. 12,114, 44 Fed. Reg. 1957 (1979), *reprinted in* 42 U.S.C. § 4321 (1982) [hereinafter EO 12,114].

23. See generally *id.*

environmental analysis for major federal actions that have significant effects on the environment outside the United States and its territories and possessions.<sup>24</sup>

#### B. Department of Defense Directive 6050.7

*Department of Defense (DOD) Directive 6050.7, Environmental Effects Abroad of Major Department of Defense Actions*,<sup>25</sup> imposes NEPA-like requirements with respect to major DOD actions that may adversely affect the environment of a foreign nation, a protected natural or ecological resource of global importance, or the global commons.<sup>26</sup> Specifically, the directive establishes environmental compliance procedures, as well as exemptions and categorical exclusions to the compliance requirements.\* The individual services have supplemented this guidance with specific rules that define the environmental documents required, levels of review for actions in the global commons, and requirements for envi-

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24. See *id.* paras. 2-3, 2-4.

25. U.S. DEP'T OF DEFENSE, DIR. 6050.7, ENVIRONMENTAL EFFECTS ABROAD OF MAJOR DOD ACTIONS (31 Mar. 1979) [hereinafter DOD DIR. 6050.7]. It is anticipated that the Office of the Secretary of Defense will replace *DOD Directive 6050.7* with updated guidance. Telephone Interview with J. Phil Huber, Special Assistant, Office of the Assistant Secretary of the Army for Pollution Prevention and Conservation, Installation, Logistics, and the Environment (Feb. 6, 1998) [hereinafter Huber Interview]. See U.S. DEP'T OF DEFENSE, DRAFT INSTR. 4715.XX, ANALYZING DEFENSE ACTIONS WITH THE POTENTIAL FOR SIGNIFICANT ENVIRONMENTAL IMPACTS OUTSIDE THE UNITED STATES (undated) [hereinafter DRAFT INSTR. 4715.XX] (draft copy on file with author).

26. See DOD DIR. 6050.7, *supra* note 25. Executive Order 12,114 refers to "global commons" as geographical areas located outside the jurisdiction of any nation, including ocean areas outside territorial limits and the continent of Antarctica. See EO 12,114, *supra* note 22. Global commons do not include contiguous zones and fisheries zones of foreign nations. In 1993, however, the U.S. Court of Appeals for the D.C. Circuit ruled that the NEPA applies to National Science Foundation activities in Antarctica. See *Environmental Defense Fund v. Massey*, 986 F.2d 528 (D.C. Cir. 1993) (holding that the NEPA applies to the National Science Foundation's decision to burn food wastes in Antarctica). The Clinton administration chose not to appeal the decision.

*Massey* represents the exception, not the rule. The *Massey* decision is based on the absence of a sovereign within Antarctica and the fact that all agency decision-making occurred within the United States. *Id.* *Massey* represents a dangerous precedent because almost all decisionmaking for U.S. actions abroad occurs within the United States, and many of the DOD's current operations take place in countries that are effectively devoid of a sovereign (for example, Somalia, Haiti, and Bosnia).

ronmental considerations that affect foreign nations and protected global resources.<sup>28</sup>

### C. Analytical Approach—The Two Prong Analysis

A two-prong analysis determines whether EO 12,114's review requirement is triggered.<sup>29</sup> The first prong is whether a major federal

action is involved. Major federal actions include: operations that involve substantial expenditures of time, money, and resources; operations that affect the environment on a large geographic scale, or have substantial environmental effects on a more limited area; and, actions that are significantly different from other actions that were previously analyzed and

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27. See DOD DIR. 6050.7, *supra* note 25. *Department & Defense Directive* 6050.7 applies to overseas MOOTW, whereas *DOD Instruction 4715.5* applies to environmental compliance at overseas installations. See U.S. DEP'T OF DEFENSE, INSTR. 4715.5, MANAGEMENT OF ENVIRONMENTAL COMPLIANCE AT OVERSEAS INSTALLATIONS (22 Apr. 1996) [hereinafter DOD INSTR. 4715.5]. This instruction implements overseas environmental baseline guidance documentation (OEBGD) for environmental compliance at overseas DOD installations. *Id.* para. 4.1. The OEBGD is a document that reflects the minimum environmental protection standards applicable to DOD installations overseas and is based on generally accepted environmental standards that are applicable to DOD facilities in the United States. *Id.* para. 6.2.2. The instruction designates DOD executive agents (EAs) for nations in which the DOD has a significant presence. *Id.* para. 6.1.1. Under the instruction, the EA is responsible for establishing final governing standards (FGS) by comparing the OEBGD and host nation environmental standards of general applicability to determine the more stringent standard for the protection of the environment. *Id.* para. 6.3.3.1. The FGS become the governing environmental protection standards for overseas DOD installations. *Id.* para. 6.3.4. The OEBGD and FGS environmental standards do not apply to the operations of naval vessels or military aircraft and are not applicable to contingency operations. *Id.* para. 2.1.4.

28. See, e.g., U.S. DEP'T OF ARMY, REG. 200-2, ENVIRONMENTAL EFFECTS OF ARMY ACTIONS, apps. G, H (23 Dec. 1988) [hereinafter AR 200-2]; U.S. DEP'T OF AIR FORCE, POLICY DIR. 32-70, ENVIRONMENTAL QUALITY (20 July 1994). The "four pillars" of environmental compliance for Army actions are compliance, restoration, prevention, and conservation. See generally U.S. ARMY ENVIRONMENTAL STRATEGY, *supra* note 4.

29. See EO 12,114, *supra* note 22, para. 3-1. Unlike the NEPA, the EO is based solely on Presidential authority and does not create a cause of action subject to judicial review. *Id.*

approved.<sup>30</sup> From a practical perspective, virtually all overseas MOOTW will meet the test for a "major federal action."

The second prong of the analysis is whether the MOOTW will significantly harm the environment. Significant environmental harm is damage to: ~~the~~ the global commons (for example, oceans or Antarctica); a foreign nation that is not participating with the United States in the action (commonly referred to as the "participating nation" exception); a foreign nation that receives from the United States, during the federal action, a generated product, emission, or effluent that is prohibited or strictly regulated by U.S. federal law; or, any area outside the United States with natural or ecological resources of global importance.<sup>31</sup> The combatant commander decides whether the "participating nation" exception applies, and, if so, the exception allows the deploying unit to avoid cumbersome documentation requirements.<sup>32</sup> Specifically, no environmental reviews or documentation is required with respect to federal actions outside the United States that affect only the environment of a "participating nation."<sup>33</sup>

Executive Order 12,114 exempts other specific major federal actions from the review requirement.<sup>34</sup> The exemptions most commonly asserted by the armed forces are actions taken following the President's direction during an armed conflict<sup>35</sup> and actions taken following the direction of the President when national security interests are involved.<sup>36</sup> Unlike the "participating nation" exception, which is simply approved by the combatant commander as part of the operational plan, these exemptions require commanders to seek affirmatively from the secretary of defense (through chan-

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30. *Id.* para. 2-3; DOD DIR. 6050.7, *supra* note 25, para. C(5). The routine deployment of ships, aircraft, or other mobile military equipment, however, is not considered to be a major federal action. *Id.*

31. EO 12,114, *supra* note 22, para. 2-3; DOD DIR. 6050.7, *supra* note 25, encls. 1-2.

32. See DOD DIR. 6050.7, *supra* note 25.

33. See U.S. ARMY CORPS OF ENG'RS, FINAL DRAFT, ENVIRONMENTAL IMPACT ANALYSIS FOR OFF-POST TRAINING AND DEPLOYMENTS 3-10 (Jan. 1998) [hereinafter FINAL DRAFT] (copy on file with author).

34. See EO 12,114, *supra* note 22, para. 2-5. The EO specifically provides for the following exemptions: (1) actions not having significant effect on the environment; (2) actions taken by the President; (3) actions taken pursuant to the direction of the President (or cabinet members) when national security interests are at stake or during an armed conflict; (4) intelligence activities or foreign arms transfer; (5) actions taken with respect to membership in international organizations; (6) disaster and emergency relief actions; and (7) export licenses, approvals, or action relating to certain nuclear activities. *Id.* The secretary of defense has the authority to approve additional exemptions. See DOD DIR. 6050.7, *supra* note 25, encl. 2, para. C.3



nels) variance from formal documentation requirements.<sup>37</sup> Executive Order 12,114 also allows the secretary of defense to designate as categorical exclusions (CXs) actions that “normally do not, individually, or cumulatively” result in significant harm to the environment.<sup>38</sup> If a CX provision covers the environmental action, the agency is relieved of any documentation requirements.<sup>39</sup> The individual services have supplemented *DOD Directive 6050.7* by providing a list of example CXs.<sup>40</sup>

#### D. The Onerous Documentation Requirements

Absent an authorized exemption or CX, a time-consuming, complicated review and documentation process is required.<sup>41</sup> Department of Defense activities that would result in significant harm to the global commons require preparation of an environmental impact statement (EIS).<sup>42</sup> For DOD actions that would cause significant harm to the environment of a foreign nation that is not participating in the action, or for an action that affects natural or ecological resources of global importance, two other

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35. Executive Order 12,114 defines “armed conflict” as:

hostilities for which Congress has declared or enacted a specific authorization for the use of armed forces; hostilities or situations for which a report is required by the War Powers Resolution, 50 U.S.C. § 1543 (a)(1); and other actions by the armed forces that involve defensive use or introduction of weapons in situations where hostilities occur or are expected.

EO 12,114, *supra* note 22, para. 2-5(a)iii. See AR 200-2, *supra* note 28, app. H. The exemption applies as long as the armed conflict continues. *Id.*

36. EO 12,114, *supra* note 22, para. 2-5(a)iii.

37. See DOD DIR 6050.7, *supra* note 25, encl. 2, para. C(3)a.

38. See EO 12,114, *supra* note 22, para. 2-5(c); DOD DIR 6050.7, *supra* note 25, encl. 1, para. C(8).

39. See EO 12,114, *supra* note 22, para. 2-5(c); DOD DIR 6050.7, *supra* note 25, encl. 1, para. C(8).

40. See, e.g., AR 200-2, *supra* note 28, app. A, § I. For example, CX A-19 allows for the deployment of military units on a temporary basis, provided that existing facilities are used **and** that activities to be performed will have no significant effects on the environment. *Id.*

41. This type of complicated documentation cuts against the exigency of military operational missions. To require a commander to halt his military mission to complete an onerous documentation process is absurd. Studies show that, depending on the complexity of the action, “the documentation process can take 3 to 24 months.” FINAL DRAFT, *supra* note 33, at 5-1.

types of environmental documents are required: environmental studies (ESs) or environmental reviews (ERs).<sup>43</sup> The ES documents bilateral or multilateral studies of actions that are relevant or related to the United States and foreign nations.<sup>44</sup> An ER is a concise review of the actions that affect the environment of a nation that is not involved in the operation and is prepared by the United States unilaterally.<sup>45</sup>

## E. Treaties

It is important to determine whether the nations that are involved in a contingency operation are parties to a bilateral or multilateral treaty. If so, the treaty may have a substantial impact on the operation. Although the treaty may not specifically apply to the environment, the terms may be sufficiently broad to encompass environmental considerations. An increasing number of treaties deal directly with environmental protection.<sup>46</sup> Treaties can affect contingency operations as implemented by domestic statutes or as incorporated in DOD standards. Although the United States may not have ratified a specific treaty, some treaties are binding on the United States as a matter of customary international law.<sup>47</sup> Accordingly, legal advisors in a contingency operation who study all applicable treaties to

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42. See EO 12,114, *supra* note 22, para. 2-4(a); DOD DIR 6050.7, *supra* note 25, encl. 2, para. C.1.; AR 200-2, *supra* note 28, app G. The development of an EIS is a time consuming process, and actually completing one is a major undertaking. For example, depending on the complexity of the proposed action, the time required to complete and to process an EIS can range from 12 to 24 months or more.

The process begins with the publication of a notice of intent (NOI), published in the *Federal Register*. The NOI initiates the public scoping period (typically 30 to 90 days in length). Although not required, at this stage, a public affairs plan is strongly recommended. During the scoping period, meetings are held to which agencies and the general public are invited to learn more about the proposal and to express their views on the process. The documents are then forwarded to the major command (MACOM). From the MACOM, the documents are forwarded to Headquarters, Department of the Army (HQDA) for a review that lasts 30 to 40 days. The documents must then be made available to the public for comment for no less than 45 days. The documents are again forwarded to HQDA for final review and approval. The document must then be submitted to the Environmental Protection Agency (EPA) for review and filing. After a 30-day public review period, the process concludes with a record of decision (ROD).

To develop a successful EIS the following 11 components are required: (1) cover sheet; (2) summary; (3) table of contents; (4) purpose and need for the proposed action; (5) alternatives considered, including the proposed action; (6) affected environment; (7) environmental and socioeconomic consequences; (8) list of preparers; (9) distribution list; (10) index; and (11) appendices. See FINAL DRAFT, *supra* note 33, at 7-1 through 7-9.

ascertain whether the provisions indeed apply to the operation will contribute to the operation's success. Knowledge of the peculiarities of treaty law

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43. See EO 12,114,*supra* note 22, para. 2-4; DOD DIR 6050.7,*supra* note 25, encls. 2-3; AR 200-2,*supra* note 28, app. H.

An [ES] is an analysis of the likely environmental consequences of the action that is to be considered in the decision-making process. The ES includes a review of the affected environment, significant actions taken to avoid environmental harm or otherwise to better the environment, and significant environmental considerations and actions by other participating nations.

DOD DIR. 6050.7,*supra* note 25, para. D.1. At the very minimum, the ES must include:

(1) a general review of the affected environment; (2) the predicted effect of the action on the environment; (3) significant known actions taken by governmental entities with respect to the proposed action to protect or [to] improve the environment; and, (4) if no actions are being taken to protect or [to] enhance the environment, whether the decision not to do so was made by the affected foreign government or international organization.

*Id.* para. D.4.

An ER is a less extensive process than an ES. "An [ER] is a survey of the important environmental issues involved. It includes identification of these issues and a review of what, if any, consideration has been or can be given to the environmental aspects by the United States and by any foreign government involved in taking the action." *Id.* para. E.1. To the extent practical, the ER should include:

(1) a statement of the action to be taken, including its timetable, physical features, general operating plan, and other similar broad-gauge descriptive factors; (2) identification of the important environmental issues involved; (3) the aspects of the actions taken or to be taken by the DOD component that ameliorate or minimize the impact of the environment; and, (4) the actions known to have been taken or planned by the government of any participating and affected foreign nations that will affect environmental considerations.

*Id.* para. E.4.

44. *Id.*

45. See EO 12,114,*supra* note 22, para. 2-4. A flow chart that details the requirements of the EO, the DOD Directive, and AR 200-2 is at Appendix 1. The chart is adapted and modified from an attachment to a U.S. Army Environmental Law Division review of draft DOD Instruction 4715.XX. See Memorandum from Mr. Steven A. Nixon, DAJA-EL, to Director of Environmental Programs, subject: Review of Draft Department of Defense (DOD) Instruction 4715.XX (3 Mar. 1997).

before a deployment can serve as a force multiplier for the combatant commander during a MOOTW.

46. See generally United Nations Convention on the Law of the Sea, Dec. 10, 1982, U.N. Doc. A/CONF.62/122, 21 I.L.M. 1261. Although the United States has not ratified this treaty, the United States accepts as binding a majority of the treaty that relates to traditional uses of the ocean, including provisions concerning the preservation of the environment of coastal states. See also Convention for the Prevention of Pollution of the Sea by Oil, May 12, 1954, 12 U.S.T. 2989, 327 U.N.T.S. 3, 121 L.M. 1319 (The United States has ratified this treaty, which restricts the discharge of oil, noxious substances, sewage, and solid wastes incidental to the operation of a ship.); Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, Dec. 29, 1972, 26 U.S.T. 2403, 1046 U.N.T.S. 120 [hereinafter London Convention] (The United States has ratified this treaty, which restricts disposal into the ocean from ships and aircraft.); The United Nations Educational, Scientific, and Cultural Organ (UNESCO) Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 27 U.S.T. 37, 1037 U.N.T.S. 151 [hereinafter World Heritage Convention] (The United States has ratified this treaty, which protects a broad range of objects and sites that are important to the cultural and natural heritage of man.); Convention on Environmental Impact and Assessment in a Transboundary Context, Feb. 25, 1991, 30 I.L.M. 800 [hereinafter Transboundary Convention] (The United States has signed, but not ratified this treaty, which provides neighboring party states with the opportunity to participate in environmental analysis for particular actions that are likely to cause significant adverse transboundary impact.); Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, U.N. Doc. UNEP/IG.80/3 (1989), 28 I.L.M. 657 [hereinafter Basel Convention] (The United States has signed, but not ratified this treaty, which restricts disposal of hazardous wastes by shipping them to less developed nations for disposal.); OFFICE OF THE JUDGE ADVOCATE GENERAL, DEP'T OF NAVY ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS § 1.2(1997).

47. See 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 601 (1987) (identifying customary international law as the source for a state's obligations regarding international environmental damage). The general principle of state responsibility for environmental damage first surfaced in the 1941 *Trail Smelter Case*, which involved sulfur dioxide emissions from a smelter plant in British Columbia. See *Trail Smelter Case* (U.S. v. Can.), 3 R. Int'l Arb. Awards 1905 (1941). The smelter plant caused personal injuries to the Washington state population. In the absence of any international judicial decisions directly on point, the Special Arbitral Tribunal examined numerous decisions of the United States Supreme Court and created the following principle:

No State has the right to use or permit the use of its territory in such a manner in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.

*Id.* at 1965. See Anthony Leibler, *Deliberate Wartime Environmental Damage: New Challenges for International Law*, 23 CAL. W. INT'L L.J. 67, 69 (1992) (citing *Trail Smelter Case*, 3 R. Int'l Arb. Awards at 1965).

## F. International Agreements &amp; Status of Forces Agreements (SOFAs)

In a contingency operation, it is also important to find out whether the nations that are involved in the operation are parties to any international agreements that are binding on the United States as a matter of either binding customary international law or as host nation law. The responsible unified command or Department of State representative for the regional area of the operation can provide information on the relevant international agreements. As with treaties, international agreements may not specifically apply to the environment or to military operations; however, the terms may be sufficiently broad to encompass both of these considerations.

A special type of international agreement, known as a status of forces agreement (SOFA), may also govern the deployment of forces overseas.<sup>48</sup> A SOFA usually includes a basic agreement and a number of supplemental agreements that deal with specific countries or specific issues in countries.<sup>49</sup> Status of forces agreements or supplemental agreements that have been negotiated since 1990 are likely to contain specific environmental provisions concerning transboundary impacts.<sup>50</sup> For example, under the 1993 revisions to the German Supplementary Agreement, "the United States will, for the first time be obligated to bear costs arising in connection

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48. The United States currently has formal SOFAs with 81 countries. See JA 422, *supra* note 13, at 3-3.

49. See, e.g., Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Forces, June 19, 1951, 4 U.S.T. 1792, 199 U.N.T.S. 67 [hereinafter NATO SOFA]; Agreement Under Article VI of the Treaty of Mutual Cooperation and Security Between the United States and Japan, Regarding Facilities and Areas and the Status of United States Armed Forces in Japan, Jan. 19, 1960, 11 U.S.T. 1652, 373 U.N.T.S. 248 [hereinafter Japanese SOFA].

50. Most existing SOFAs were negotiated shortly after World War II, before the onset of modern environmental awareness. Consequently, they rarely deal with environmental issues, but, in the future, they will more than likely be supplemented to contain environmental provisions. See NAVAL JUSTICE SCHOOL, U.S. NAVY, CONSOLIDATED ENVIRONMENTAL LAW DESKBOOK 36-9 (May 1994) [hereinafter ENVIRONMENTAL LAW DESKBOOK].

with the assessment, evaluation, and remedying of hazardous substance contamination caused" by U.S. forces in Germany.<sup>51</sup>

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51. Richard A. Phelps, *Environmental Law for Overseas Installations*, 40 A.F.L. REV. 49, 82 (1996). See also Agreement to Supplement the Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of their Forces With Respect to Foreign Forces Stationed in the Federal Republic of Germany, Mar. 18, 1993 [hereinafter Supplemental Agreement to FRG SOFA]. This document is located on the internet at <<<http://www.aeim.hqusaareur.army.mil/library/MIS/NATOSOFA/NATOSOFA-1.htm>>>. The supplemental agreement to the Germany SOFA is drafted broadly to encompass a wide range of claims for damage to land that is caused by U.S. forces. Specifically, Article 41 provides for settlement of claims for damages to German land. See *id.* art. 41. This provision could encompass environmental claims based on, for example, fuel spills, damage to deepwater aquifers, and damage to historical landmarks. Additionally, Article 54a, a new provision to the SOFA, places an obligation on the sending states to "recognize and acknowledge the importance of environmental protection in the context of all the activities of their forces within the Federal Republic." *Id.* art. 54a. This provision places an obligation on the sending state to "identify, analyze and evaluate potential effects of environmentally significant projects on persons, animals, plants, soil, water, air, climate and landscape, including interactions among them, as well as on cultural and other property." *Id.* Furthermore, Article 54b, another new provision to the SOFA, places the burden on the sending state to "ensure that only fuels, lubricants, and additives that are low-pollutant in accordance with German environmental laws are used in the operation of aircraft, vessels, and motor vehicles." *Id.* art. 54b.

## 11. An Analysis of the Continuum of Recent Contingency Operations — The Legal Void in Environmental Law

### A. The Legal Void

Executive Order 12,114 and supplementing DOD directives are of little or no practical value to a combatant commander who is responsible for developing an environmental posture level in a MOOTW theater of operation ~ A clear, concise legal basis for environmental doctrine during MOOTW does not presently exist. At one end of the legal spectrum, domestic environmental laws have limited applicability during overseas contingency operations and, generally, do not apply extraterritorially.<sup>53</sup> At the other end, the DOD law of war program mandates that U.S. armed forces “apply law of war principles during all operations that are categorized as [MOOTW].”<sup>54</sup> Furthermore, the standard for environmental compliance during warfare due to military necessity and allowable collateral damage is much less restrictive than the compliance that may be necessary during peace operations.<sup>55</sup> Applying the law of war by analogy to MOOTW, therefore, does not provide a legal framework for the protection

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52. In this regard, scholars who have studied the application of the current DOD environmental framework to MOOTW agree with this somewhat radical view. *See, e.g.*, CARR, *supra* note 10, at 20 (asserting that “environmental doctrine during [M]OOTW remains elusive for operational commanders”); STEPHEN DYCUS, NATIONAL DEFENSE AND THE ENVIRONMENT 151 (1996) (noting that there currently exists serious disagreement over the circumstances that require waiver for the documentation requirements under EO 12,114).

53. *See* National Environmental Policy Act, 42 U.S.C.A. §§ 4321-4370a (West 1998). *See also* EO 12,114, *supra* note 22; *supra* notes 20-24 and accompanying text (discussing the concept of extraterritoriality).

54. CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 3 121.02, STANDING RULES OF ENGAGEMENT (1 Oct. 1994). *See* CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 5810.01, IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM (12 Aug. 1996); U.S. DEP’T OF DEFENSE, DIR 5100.77, DOD LAW OF WAR PROGRAM (10 July 1979). *Chairman, Joint Chiefs of Staff Instruction 5810.01* states, “U.S. armed forces will comply with the law of war during the conduct of all military operations and related activities in armed conflict, however such conflicts are characterized, and, unless otherwise directed by competent authorities, will apply law of war principles during all operations” that are categorized as MOOTW. *See* JOINT PUB. 3-07, *supra* note 16.

55. *See* Harry H. Almond, Jr., *Strategies for Protecting the Environment: The Process of Coercion*, 23 U. TOL. L. REV. 295, 338 (postulating that the general principle of military necessity and the various law of war rules relating to the principles of minimizing collateral damage during targeting analysis are applicable to the protection of the environment during warfare).

of the environment during a contingency operation that delineates a clear environmental standard adequate to meet the needs of the operation.<sup>56</sup>

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56. A well-known scholar in this area articulates the view that the law of war "furnishes an incomplete and unpredictable bulwark against excessive environmental damage even in times of actual war or armed conflict." *Id.* (citation omitted). During the aftermath of Desert Shield/Desert Storm in 1991, Saddam Hussein's intentional release of oil into the ocean and torching of Kuwaiti oil fields brought to the forefront of the international community the concern for the environment during warfare. See Walter G. Sharp, Sr., *The Effective Deterrence of Environmental Damage During Armed Conflict: A Case Analysis of the Persian Gulf War*, 137 MIL. L. REV. 1 (1992). See also Adam Roberts, *Environmental Issues in International Armed Conflict: The Experience of the 1991 Gulf War*, 69 U.S. NAVAL WAR C. INT'L L. STUD. 222, 260 (1996). The protection of the environment during warfare was covered only in a general manner before 1970. See Hague Convention No. IV Respecting the Law and Customs of War on Land, 36 Stat. 2277, 75 U.N.T.S. 287, reprinted in U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE (18 July 1956) (establishing principles of limitation which prohibit unnecessary destruction of property not required by military necessity); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (prohibiting destruction of real property except where rendered absolutely necessary by military operations); Geneva Convention for Amelioration of the Condition of the Wounded and Sick of Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (prohibiting, and designating as a grave breach, extensive destruction of property when it is not justified by military necessity).

The word "environment" did not appear in any law of war treaty before 1977. Since 1977, however, specific treaties codify provisions that address problems raised by the vulnerability of the environment during warfare. See 1977 Protocols Additional to the Geneva Conventions of 1949, Dec. 12, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1391 [hereinafter 1977 Protocols]. See also U.S. DEP'T OF ARMY, PAM. 27-1-1, PROTOCOLS TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (1979). Certain provisions of Protocol I specifically protect the environment. For example, Article 35(3) of Protocol I prohibits employing methods or means of warfare that are intended or expected to cause widespread, long-term and severe damage to the natural environment. 1977 Protocols, *supra*, art. 35(3). Article 55 of Protocol I provides an affirmative duty to protect the environment against widespread, long-term severe damage. *Id.* art. 55. The United States has not ratified Protocol I, but specifically recognizes some portions as binding as a matter of customary international law. The United States specifically does not support Articles 35 and 55 of Protocol I; the United States views these provisions as too broad and ambiguous. See Memorandum from Major P. A. Seymour, U.S. Marine Corps, subject: Additional Protocol I as Expressions of Customary International Law (undated) (copy on file with author). The other treaty to address the environment since 1977 is the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques of 1977. See Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques of 1977, May 18, 1977, 31 U.S.T. 333, 1108 U.N.T.S. 151, 161 L.M. 88 [hereinafter 1977 ENMOD Convention]. The United States ratified this convention on 17 January 1980. Generally, the convention prohibits techniques that modify the environment with widespread, long-lasting or severe effects. *Id.* Protocol I deals directly with the dangers that modern warfare represent for the natural environment. See 1977 Protocols, *supra*.



The void in environmental law results in the currently employed ad hoc and piecemeal approach to each contingency operation. The burden falls on combatant commanders to extend domestic laws subjectively in an effort to establish the "legal basis for their theater's [sic] environmental protection policy."<sup>57</sup> "This method of determining environmental doctrine for MOOTW is often ineffective and legally unsound . . . and results in doctrine that is incomplete, inconsistent, and confusing."<sup>58</sup> An analysis of recent contingency operations illustrates the problems associated with the current ad hoc, piecemeal approach and the lack of clarity in the area of environmental law.

## B. The Continuum of Recent Contingency Operations

### 1. *Operation Restore Hope (Somalia)*

In December 1992, the United States deployed forces to Somalia for Operation Restore Hope, under the authority of United Nations Security Council Resolution 794.<sup>59</sup> During this operation, the combatant commander **could** not use the "participating nation" exception **because** Somalia **lacked** a stable government that was capable of enforcing host nation law.<sup>60</sup> Accordingly, the United States could either accept formal DOD obligations to conduct an ES or an ER, or seek an exemption. The combatant commander sought and received an exemption from the DOD.<sup>61</sup> Due to the nature of the operation and the existing level of destruction in the theater, environmental considerations were admittedly a "low priority."<sup>62</sup> In Addition, the absence of any local government or regulatory system **left** a void of host nation environmental controls. Consequently, legal advisors advised the United Nations Task Force (UNITAF) commander that operations must comply with U.S. environmental laws if such compli-

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57. CARR, *supra* note 10, at 20.

58. *Id.*

59. See S.C. Res. 794, U.N. SCOR, 47th Sess., U.N. Doc. S/RES/794 (1992) (authorizing military enforcement action to create a secure environment for humanitarian relief operations). See also WALTER GARY SHARP, SR., U.N. PEACE OPERATIONS: A COLLECTION OF PRIMARY DOCUMENTS AND READINGS GOVERNING THE CONDUCT OF MULTILATERAL PEACE OPERATIONS 353 (1995) (providing a case study on Operation Restore Hope and other documents relating to the background of this operation); Karen V. Fair, *The Rules of Engagement in Somalia—A Judge Advocate's Primer*, 8 SMALL WARS AND INSURGENCIES 107, 108 (1997) (describing the destruction and deplorable conditions in Somalia during Operation Restore Hope).

ance did not interfere with mission accomplishment.<sup>63</sup> Although U.S. forces received an exemption from the review and documentation requirements, the command, nonetheless, prepared an environmental audit.<sup>64</sup>

During Operation Restore Hope, the environmental annex was neglected. Operation Restore Hope demonstrates that environmental issues in a poor, third world country that is devoid of an effective government or legal system receive little, if any, attention during fast-paced oper-

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60. During the drafting of this article, the author was exposed to a potential criticism of the article's proposals. This criticism is based on a premise that it is unnecessary for the United States armed forces to incorporate stringent environmental standards in a poverty stricken country, such as Somalia.

[I]n a political environment such as existed in Somalia that tolerated the starvation of children, considerations about where to dispose of motor oil [could actually] be meaningless. When the resources barely exist to provide humanitarian assistance and the host country could care less about environmental stewardship . . . there may not be a convincing need to implement stringent environmental law programs.

Memorandum from Lieutenant Colonel John M. German, Professor, Admin. & Civ. L. Dep't, The Judge Advocate General's School, to Major Karen V. Fair, subject: The Judge Advocate General's Corps Professional Writing Program Grading Worksheet (undated) (copy on file with author). In response to this type of overall criticism to the author's proposal, the armed forces have a need for a standardized environmental package and standardized training for every deployment, regardless of the world "hot spot" involved. Consider, for example, the following hypothetical scenario: the 1st Cavalry Division of III Corps and Fort Hood, Fort Hood, Texas, is tasked to deploy maneuver brigades simultaneously to Africa, Haiti, and to Southwest Asia. The training and the planning for environmental considerations must be a standardized packet for each of these deployments, regardless of whether the deployment is in a poor, underdeveloped country (for example, Somalia) or in the wealthier European theater (for example, Bosnia). The author expresses her gratitude to LTC German for his expert assistance in the final draft of this paper.

61. See Major Richard L. Whitaker, *Environmental Aspects of Overseas Operations*, ARMY LAW., July 1997, at 21 (citing Memorandum, Director, Joint Staff, to the Under Secretary of Defense for Acquisition and Technology, subject: Exemption from Environmental Review (17 Oct. 1994) (transmitting the request from the combatant commander to the DOD for variance from documentation requirements)).

62. See OFFICE OF THE STAFF JUDGE ADVOCATE, UNIFIED TASK FORCE SOMALIA, AFTER ACTION REPORT AND LESSONS LEARNED 34 (undated) (on file with author) [hereinafter RESTORE HOPE AAR]. One documented issue, however, concerned the dumping of confiscated weapons and ammunition into the ocean. In this instance, judge advocates advised that this dumping violated the London Convention. *Id.* See also London Convention, *supra* note 46.

63. Frederic L. Borch, Judge Advocates in Africa: Operation Restore Hope and UNOSOM II 1992-1994, ch. 9 (unpublished draft history of the U.S. Army JAG Corps in MOOTW, draft excerpt copy on file with author).

ations. Due to the absence of a legal system, the United States did not have any host nation laws to follow. Consequently, the United States did not plan for, or follow, a systematic approach to environmental considerations. At the close of UNITAF operations in May 1993, the UNITAF staff judge advocate advised that advance planning for an environmental annex would prove critical for future contingency operations.<sup>65</sup> Furthermore, he suggested the need for a standardized environmental annex that is integrated into the tactical standard operating procedure.<sup>66</sup>

## 2. Operation Uphold Democracy (Haiti)

In the wake of United Nations Security Council Resolution 940<sup>67</sup>, U.S. forces deployed to Haiti in a semi-permissive entry labeled Operation Uphold Democracy.<sup>68</sup> The nature of this operation immediately raised questions concerning Haiti's status as a participating nation for environmental compliance purposes.<sup>69</sup> President Clinton initially announced that the United States "would use military force to oust the Cedras regime from power."<sup>70</sup> In an effort to avoid an invasion and to prevent bloodshed, he dispatched to Haiti a diplomatic team consisting of former President Jimmy Carter, General Colin L. Powell, and Senator Sam Nunn.<sup>71</sup> On 18

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64. See RESTORE HOPE AAR, *supra* note 62, at 34. On the continuum of documentation requirements, the EA is less extensive than an EIS, ER, or ES. See *supra* notes 41-45 and accompanying text. An environmental audit (EA) is a concise public opinion document with the following functions: (1) briefly provides sufficient evidence and analysis for determining whether to prepare an EIS; (2) aids an agency's compliance with the NEPA-like requirements under EO 12,114, when an EIS is not required (in other words, helps to identify alternative courses of action and mitigation measures); and (3) facilitates preparation of an EIS when one is necessary. See FINAL DRAFT, *supra* note 33, app. C-25. Unlike an EIS, since the EA is a concise document, it should not contain long descriptions or detailed data that the agency may have gathered. *Id.* Rather, it should contain a brief discussion of the need for the proposal, the environmental impacts of the proposed action and alternatives, and a list of agencies and persons consulted. *Id.* In comparison to the EIS process, the EA process is streamlined and less time-consuming. The process usually begins independently without any formal public notification. *Id.* at 7-2. The process does not require public review and comment. Additionally, there is no requirement for Headquarters, Department of the Army or the Environmental Protection Agency to review the EA. *Id.*

65. See RESTORE HOPE AAR, *supra* note 62, at 34.

66. See *id.*

67. See S.C. Res. 940, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/940 (1994) (authorizing "all necessary means" to remove the military leadership, to maintain a secure environment, and to enforce the Governor's Island agreement during Operation Uphold Democracy).

September 1994, at the precise hour that paratroopers from the 82nd Airborne Division were flying to drop zones in Haiti for a forced entry, the Cedras regime agreed to relinquish control.<sup>72</sup> At that moment, the U.S. operation suddenly became a semi-permissive entry. Haitian officials then

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68. *See generally* CENTER FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, LESSONS LEARNED FOR JUDGE ADVOCATES, OPERATION UPHOLD DEMOCRACY (11 Dec. 1995) [hereinafter UPHOLD DEMOCRACY AAR] (copy on file with the Center for Law and Military Operations). Similar to the environmental destruction observed in Somalia, one-third of the Haitian landscape had suffered serious soil erosion due to generations of indifference to ecological problems. *Id.* at 13. This observation was critical in Haiti and will prove critical in future operations. Combatant commanders and their staffs must take the necessary precautions to document existing environmental degradation to ensure that fraudulent environmental claims are not lodged against the United States government during MOOTW.

69. At least one commentator has devised a technique for discerning the "participating nation" exception by considering the nature of the United States entrance into a host nation. Generally, there are three different forms of entry by U.S. forces into a foreign nation: "(1) a forced entry; (2) a semi-permissive entry, or (3) permissive entry." *See*, Whitaker, *supra* note 61, at 21. A permissive entry infers host nation cooperation, thereby allowing use of the participating nation exception. *Id.* On the other end of the spectrum, a forced entry would rarely infer a participating nation. *Id.* The middle of the spectrum, a semi-permissive entry, however, presents the more complex scenario.

In this case, the [legal advisor] must look to the actual conduct of the host nation. If the host nation has signed a stationing or status of forces agreement, or has in a less formal way agreed to the terms of the United States deployment within the host nation's borders, the host nation is probably participating with the United States (at a minimum, in an indirect manner). If the host nation expressly agrees to the United States entry and agrees to cooperate with the military forces of the United States, the case for participating nation status is even stronger. Finally, if the host nation agrees to work with the United States on conducting a bilateral environmental review, the case is stronger still.

*Id.*

70. UPHOLD DEMOCRACY AAR, *supra* note 70, at 12.

71. *Id.*

72. *Id.* at 13.

agreed to work with the United States on conducting a bilateral environmental audit.<sup>73</sup>

In Operation Uphold Democracy, the J4-Engineer Section and the staff judge advocate facilitated the use of the “participating nation” exception. During the operation, these staff members also “disseminated the environmental guidelines and standards adopted in the joint operational plan.”<sup>74</sup> Despite the success of the Haitian operation, environmental planning lacked focus.<sup>75</sup> At the close of Operation Uphold Democracy, military planners were voicing the same frustrations that planners and operators expressed after Operation Restore Hope. The primary criticism was that environmental management lacked proper prior planning.<sup>76</sup> For example, units deployed without certain necessary equipment, such as sufficient fifty-five gallon drums for hazardous waste disposal, vehicle drip pans, spill response equipment, and sufficient field latrines. The critical player in the oversight of environmental considerations, the joint task force engineer, was a last minute addition to the deployment. Earlier involvement of this staff officer may have prevented most of the shortfalls.<sup>77</sup>

During the Haiti operation, no plan existed for the systematic requisition and cross-leveling of environmental materials.<sup>78</sup> A joint service review of the Haiti deployment recommended that the joint task force engineer office receive necessary environmental assets, including an inspection team, subject matter experts, and a periodic command forum for discussing environmental problems and solutions.<sup>79</sup> Based on the joint service assessment that no environmental plan existed for the operation,

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73. See Memorandum, Major Mike A. Moore, United States Atlantic Command J4-Engineer, subject: Environmental Concerns of MNF (Jan. 24, 1995) (copy on file with the Center for Law and Military Operations) (concluding that EO 12,114 did not apply to Operation Uphold Democracy due to the “participating nation” exception and that U.S. forces on the ground in Haiti should coordinate with Haitian authorities to conduct a bilateral environmental audit).

74. Whitaker, *supra* note 61, at 21.

75. JOINT CHIEFS OF STAFF, UPHOLD DEMOCRACY; REAL WORLD OPS; DEPLOYMENT; HAITI; JOINT PLANNING ANNEX, JOPES: JTF ORDERS/GUIDANCE, JOINT UNIVERSAL LESSONS LEARNED SYSTEM (JULLS) No.: 02835-43293 (Sept. 19, 1994) [hereinafter JULLS REPORT] (copy on file with author).

76. See *id.*

77. See *id.* See also JOINT CHIEFS OF STAFF, JOINT PUB. 4-04, JOINT DOCTRINE FOR CIVIL ENGINEERING SUPPORT, at II-7, II-8 (22 Feb. 1995) [hereinafter JOINT PUB. 4-04]. Under current joint doctrine, the civil engineer is responsible for oversight of the impact that military operations have on the environment. *Id.*

78. JULLS REPORT, *supra* note 75.

79. *Id.*

the assessment recommended specific system improvements for future deployments: deploy units with the requisite level of education to identify and to solve environmental problems; equip units with necessary environmental supplies; add an environmental engineer to the joint task force staff; and include critical environmental planning in the crisis action procedures in the joint operation planning and execution system (JOPES).<sup>80</sup>

### 3. *Operation Joint Endeavor (Bosnia)*

On 19 December 1995, the United States armed forces joined a multinational military implementation force in Bosnia during Operation Joint Endeavor.<sup>81</sup> From the outset, environmental considerations played a major role in mission accomplishment. Unlike the Somali and Haitian operations, where host nation law was either sparse or nonexistent, the Bosnian operation required the European Command staff judge advocate to understand and to apply host nation laws and to negotiate various international agreements concerning environmental factors.<sup>82</sup> Due to the lack of proactive planning for environmental operations, the time invested in the early stages of the operation researching the applicable international and host nation environmental laws, understanding SOFA provisions, and negotiating the requisite transit agreements to allow for the transboundary shipment of hazardous wastes initially impeded the Operation Joint Endeavor mission.

At the beginning of Operation Joint Endeavor, the European Theater commander served as the environmental executive agent (EEA).<sup>83</sup> The EEA rapidly developed and coordinated environmental standards and procedures for all U.S. forces in the theater.<sup>84</sup> Based on the intense focus on environmental considerations during the operation, U.S. Army Europe requested the authority to use the Brown & Root Logistics Civil Augmen-

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80. *Id.* See 2 JOINT CHIEFS OF STAFF, MANUAL 3122.03, JOINT OPERATION PLANNING AND EXECUTION PLANNING AND EXECUTION SYSTEM (JOPES) (1 June 1996) [hereinafter JCS MANUAL 3122.03] (mandating use of the JOPES). The *JOPES Manual* governs the development of operation plans submitted for review to the chairman of the Joint Chiefs of Staff.

81. See S.C. Res. 1031, U.N. SCOR, 52nd Sess., U.N. Doc. S/RES/1031 (1995) (authorizing "all necessary measures" to protect the United Nations Protection Force (UNPROFOR) and implementation of the multinational implementation force (IFOR) during Operation Joint Endeavor). This force consisted of approximately 60,000 troops in ground, air, and maritime units from over 25 NATO and non-NATO nations. See American Forces Press Service, 9539 Main Body Deployed for NATO Operation Joint Endeavor, <<http://www.dtic.mil/afps/>>

tation Program (LOGCAP) contract to provide environmental services for all U.S. personnel located at thirty different bases in Bosnia, Hungary, and Croatia.<sup>85</sup> The LOGCAP scope of work included: “environmental baseline surveys; hazardous waste management program; hazardous materials emergency spill response program; bio-medical waste management program; solid waste management program; water and wastewater (sewage) transfer and treatment systems.”<sup>86</sup>

The use of the LOGCAP contract and host nation contractors<sup>87</sup> was necessary because of the President’s ceiling on the number of troops authorized in Bosnia, the initial lack of host nation support agreements, and the desire to maintain a relatively low United States presence in this politically charged theater of operations.<sup>88</sup> Activating the LOGCAP contract to per-

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82. Judge advocates at all operational levels were involved in the negotiation and implementation of international agreements during Operation Joint Endeavor. The environmental provisions are included as part of the transit agreements concerning a wide range of issues, including the status of NATO personnel, establishment of mail and telecommunication services, use of facilities for the preparation and execution of the operation, and claims procedures. Interview with Major John Miller, Center for Law & Military Operations, The Judge Advocate General’s School, at Charlottesville, Va. (Mar. 17, 1998) [hereinafter Miller Interview]. See generally Agreement with Bosnia-Herzegovina Concerning the Status of NATO and its Personnel, Nov. 23, 1995, 35 I.L.M. 102; Agreement Between the Federal Republic of Yugoslavia and the North Atlantic Treaty Organization (NATO) Concerning Transit Arrangements for Peace Plan Operations, Nov. 23, 1995, 35 I.L.M. 106 [hereinafter Yugoslavian Transit Agreement]; Agreement Between The North Atlantic Treaty Organization (NATO) and the Government of the Republic of Hungary Regarding the Transit and Temporary Stationing of IFOR, Dec. 6, 1995 [hereinafter Hungary Transit Agreement]; Agreement Between the North Atlantic Treaty Organization (NATO) and the Government of the Republic of Slovenia Regarding Transit Agreements, Dec. 22, 1995 [hereinafter Slovenian Transit Agreement]; Agreement Between the Republic of Croatia and the North Atlantic Treaty Organization (NATO) Concerning the Status of NATO and its Personnel, Nov. 23, 1995, 35 I.L.M. 104 [hereinafter Croatian Transit Agreement] (copies of all transit agreements on file with the Center for Law and Military Operations).

83. See CARR, *supra* note 10, at 31. See also DOD INSTR. 4715.5, *supra* note 27, para. 6.1.2. The under secretary of defense for environmental security designates environmental executive agents for environmental matters in foreign countries where DOD installations are located. *Id.* For the purposes of Operation Joint Endeavor, the European Command delegated this authority to U.S. Army Europe. CARR, *supra* note 10, at 31.

84. See CARR, *supra* note 10, at 31. This type of proactive environmental oversight did not occur in either the Somalia or Haiti operation because this high level of environmental scrutiny and planning was not a prerequisite for completing the military mission in those impoverished nations, where effective governments were lacking.

85. See *id.* See also GENERAL ACCOUNTING OFFICE, REPORT ON CONTINGENCY OPERATIONS, REPORT No. GAO/NSIAD-97-63 (1997) [hereinafter GAO REPORT] (copy on file with author).

86. CARR, *supra* note 10, at 31. See GAO REPORT, *supra* note 85, at 7.

form these essential environmental services also allowed the limited number of uniformed forces in the theater to focus on the peace enforcement mission.

Operation Joint Endeavor raised additional environmental concerns because of its proximity to the borders of other countries. For example, transporting hazardous wastes out of Bosnia and Croatia to other European countries was particularly problematic.<sup>89</sup> The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal regulates transboundary shipments of hazardous wastes.<sup>90</sup> Ninety-seven of the world's 185 countries have ratified the Basel Convention's restrictions on the transboundary movement of hazardous waste, including Croatia, Hungary, and Austria.<sup>91</sup> The United States signed, but has not yet ratified, the Convention and is not obligated to comply with its

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87. During the early stages of Operation Joint Endeavor, the Defense Logistics Agency (DLA) was tasked with the waste management and disposal mission, and the DLA delegated the mission to the Defense Reutilization and Marketing Region Europe (DRMR-E). The DRMR-E offered contracts to local European contractors for the disposal of waste. This was possible because Hungary had existing waste facilities that could be used for disposing of DOD waste in accordance with United States law, host nation law, and the Basel Convention. Two separate fixed-fee contracts were awarded to a German firm: one for the disposal operations in Hungary and the other for disposal of waste generated in Croatia and Bosnia. *See* CARR, *supra* note 10, at 34.

88. *See* GAO REPORT, *supra* note 85, at 6-8.

89. *See* Burman and Hollingsworth, *supra* note 18, at 33.

90. *See* Basel Convention, *supra* note 46. Professors Anthony D'Amato and Kirsten Engel provide a descriptive overview of the Basel Convention:

The regime established by the Basel Convention is based on the following principles: the generation of hazardous wastes must be reduced to a minimum; where it is unavoidable, the wastes must be disposed of as close as possible to the source of generation. In a number of instances, export of hazardous wastes is prohibited absolutely: hazardous wastes may not be exported to Antarctica, or to States which are not parties to either the Basel Convention or a treaty establishing equivalent standards [e.g., Bamako Convention], or to parties which have banned all imports of such wastes. In all other cases, transboundary waste movements must conform to the provisions of the Convention: they are permissible only if they present the best solution from an environmental viewpoint, if the principles of environmentally sound management and disposal are observed, and if they take place in conformity with the regulatory system established by the Convention.



terms. During Operation Joint Endeavor, however, U.S. forces complied with the Convention's mandates in an effort to establish and to maintain a healthy relationship with the international community and to avoid a potential international incident.<sup>92</sup>

The U.S. LOGCAP contractors required a method of moving U.S.-generated waste products from Bosnia across the borders into Hungary, Croatia, and Germany for their treatment or disposal.<sup>93</sup> The Basel Convention, however, encourages the disposal of hazardous wastes in the generating nation to improve and to protect the environment and to ensure the sound management of hazardous wastes during transport.<sup>94</sup> Pursuant to certain agreements and with notification and approval, parties to the Convention may send hazardous waste to other parties to the Convention for disposal or receive such waste from other parties to the Convention.<sup>95</sup> The Convention prohibits parties from sending hazardous waste to, or receiving hazardous waste from, non-parties without bilateral, multilateral, or regional arrangements, and such arrangements must not run counter to the Convention.<sup>96</sup> Accordingly, the Convention prohibits the transport of "hazardous wastes from a non-member nation—for example, Bosnia-Herzegovina—to a member nation (such as Croatia) unless a special agreement has been negotiated."<sup>97</sup>

After a complicated and time-consuming negotiation process with European Command, the North Atlantic Treaty Organization, and several U.S. embassies, the Croatian government approved the "transit agreement" to allow U.S. government contractors passage across the Croatian border.<sup>98</sup> Between June 1996 and February 1997, Croatia prohibited U.S. contractors from transporting hazardous waste from Bosnia across the Croatian border. During this period, uniformed military transporters moved the hazardous wastes across international borders, thereby diverting them from the primary peace enforcement mission.<sup>99</sup> Before the con-

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91. See *Multilateral Treaties Deposited with the Secretary-General*, U.N. Doc. ST/LEG/SER.E/14/1996 (citing Basel Convention, *supra* note 46). This document can also be located on the internet at <<http://www.treaty.un.org>>.

92. See *supra* note 82 and accompanying text.

93. Burman and Hollingsworth, *supra* note 18, at 33 (citation omitted).

94. Basel Convention, *supra* note 46, preamble.

95. *Id.* art. 4.

96. *Id.* art. 11.

97. Burman and Hollingsworth, *supra* note 18, at 34. See Basel Convention, *supra* note 46, art. 11.

98. See Croatian Transit Agreement, *supra* note 82. See CARR, *supra* note 10, at 35.

tractors were allowed to transport hazardous waste across international borders, Croatia demanded the negotiation of transit agreements with the transit countries, such as Hungary and Austria, and then with Germany, the final destination country.<sup>100</sup> Croatia also demanded that transit agreements contain a specific provision that transit wastes would not be impeded.<sup>101</sup> Finally, in February 1997, the parties agreed to the transit agreements, and the LOGCAP contractor could begin the shipment of hazardous wastes.<sup>102</sup>

This complicated and lengthy hazardous waste transport problem illustrates the need to anticipate the environmental restrictions that can impede the operation's mission. At the very minimum, legal advisors must identify the requisite international agreements and applicable host nation law before an overseas contingency operation. Prior planning will ensure that the operational plan addresses the impact of international law on all nations that are in the close proximity of a geographic "hot spot" that is identified for the contingency operation.<sup>103</sup> The successful completion of the operation may very well depend on this type of preventive law practice

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99. The countries involved in the Dayton Peace Accords negotiations agreed to an alternative to the Basel Convention for the Bosnian operation. *See* Bosnia and Herzegovina-Croatia-Yugoslavia: General Framework Agreement for Peace in Bosnia and Herzegovina with Annexes, Dec. 14, 1995, Bosn.-Herz., 35 I.L.M. 75. The agreement allowed U.S. uniformed personnel to transport their cargo, including hazardous waste, across international borders. *Id.* The Dayton Accords, however, did not provide for this same freedom of movement of hazardous waste by U.S. contractors and did not include a specific provision for the transport of hazardous waste. CARR, *supra* note 10, at 40.

100. *See* Burman and Hollingsworth, *supra* note 18, at 34.

101. *See id.* *See also* Croatian Transit Agreement, *supra* note 82, para. 9. Paragraph 9 of the Croatian transit agreement provides that "NATO personnel shall enjoy, together with their vehicles, vessels, aircraft and equipment, free and unrestricted passage and unimpeded access throughout Croatia including Croatian airspace and territorial waters." *Id.* The Croatians argued that this agreement did not have the language necessary to encompass U.S. contractors. *See* Burman and Hollingsworth, *supra* note 18, at 34. Consequently, the Croatians insisted upon a modification to the agreement. *Id.*

102. *See* Burman and Hollingsworth, *supra* note 18, at 34. United States uniformed personnel have transportation assets capable of moving hazardous wastes during contingency operations; however, this course of action is not cost-effective when the government is also paying contractors to perform this task. The LOGCAP contractors provide their own transportation assets for the task, and it is duplicative effort to task military vehicles to perform the same task. Additionally, this waste of resources diverts the uniformed personnel from their primary tactical mission. If it becomes necessary for uniformed personnel to perform this task, only drivers with the required training and skills in handling hazardous materials should be used. CARR, *supra* note 10, at 40.

and international law savvy.<sup>104</sup> This practice is also critical for insulating the commander from potential criminal prosecution.<sup>105</sup>

#### 4. *Operation Joint Guard (Bosnia)*

On 17 December 1996, alliance officials signed activation orders for the second phase of the Bosnian peace mission, Operation Joint Guard, an operation that continues even today.<sup>106</sup> The stabilization force is operating under the most detailed and comprehensive environmental operational plan in the history of peace operations.<sup>107</sup> Due to extensive media coverage, and in a constant effort to maintain amicable international relations, such planning is necessary to ensure the political and operational success of this prolonged deployment.

Operation Joint Guard's environmental operational plan does an excellent job of integrating environmental requirements under SOFAs, host nation laws, and Army regulations. Noticeably absent, however, is any reference to the complicated framework of *DOD Directive 6050.7, EO*

103. See Burman and Hollingsworth, *supra* note 18, at 34 n. 109 (citing Organization of African Unity: Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management, Jan. 29, 1991, 30 I.L.M., *reprinted in* ENVIRONMENTAL LAW ANTHOLOGY, *supra* note 90, at 23). As more African nations ratify the Bamako Convention, which is similar to the Basel Convention, it will further complicate operational deployments to African nations by restricting the movement of hazardous wastes across the borders of other African countries.

104. The legal advisor's role is to research, to understand, and to apply international law and also to serve in the negotiation and implementation of international agreements during contingency operations. To accomplish this mission, the legal advisor must rely on the Department of State to delegate the power to negotiate international agreements. Accordingly, the requirement to negotiate an international agreement for a contingency operation mandates that, prior to deployment, the legal advisor proactively raise the matter through command channels to the appropriate DOD and Department of State officials responsible for the specific regional area. Telephone Interview with Lieutenant Colonel (Retired) Walter Gary Sharp, Sr., Director, AEGIS Center for Legal Analysis, formerly Deputy Legal Counsel to the Chairman, Joint Chiefs of Staff (Mar. 29, 1998) [hereinafter Sharp Interview]. See U.S. DEP'T OF ARMY, REG. 550-51, FOREIGN COUNTRIES AND NATIONAL AUTHORITY AND RESPONSIBILITY FOR NEGOTIATION, CONCLUDING, FORWARDING, AND DEPOSITING OF INTERNATIONAL AGREEMENTS (1 May 1985); U.S. DEP'T OF DEFENSE, DIR. 5530.3, INTERNATIONAL AGREEMENTS (2 Feb. 1995).

105. See Burman and Hollingsworth, *supra* note 18, at 34. Under the Basel Convention, illegal trafficking of hazardous waste is a criminal act. Basel Convention, *supra* note 46, art. 4 (3).

106. The stabilization force consisted of about 31,000 multinational troops, including about 8500 U.S. troops. See American Forces Press Service, *supra* note 81.

12,114, or relevant Joint Chiefs of Staff publications. The environmental operational plan covers a broad spectrum of environmental issues and attempts to set forth balanced guidance.

The operational plan begins with a detailed analysis of the current situation's framework, including the legal, financial, political, and public relations consequences of the failure to adhere to environmental standards.<sup>108</sup> It also sets forth coherent and understandable operational guidance in the specific areas of hazardous waste clean-up and disposal,<sup>109</sup> hazardous waste management and transport,<sup>110</sup> site remediation,<sup>111</sup> spill prevention and control,<sup>112</sup> flora and fauna protection,<sup>113</sup> and archaeological and historical preservation.<sup>114</sup> Additionally, it includes as annexes an environmental out-processing checklist, an environmental out-processing report, hazardous waste shipment notification forms, environmental reporting guidelines, an environmental request for support worksheet, and applicable standards for the determination of spill amount and treatment

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107. See HEADQUARTERS SFOR [STABILIZATION FORCE], SARAJEVO, BOSNIA, AND HERZEGOVINA, CAMPAIGN DIR No. 24 (CD 24) to OPLAN 3 1406, COMSFOR's ENVIRONMENTAL POLICY (July 1997) [hereinafter OPERATION JOINT GUARD ENVIRONMENTAL ANNEX]. The Operation Joint Guard environmental annex specifically cites the need for U.S. forces to "retain a good name [as environmental stewards], even after the mission is complete." *Id.* at 1. The annex also cautions U.S. land forces in Bosnia-Herzegovina and Croatia that they are "under the close scrutiny of the civilian population in a campaign where perceptions are often times the most important element." *Id.* This annex allows U.S. forces to "improve their position" in regards to environmental compliance. *Id.* The issue of compliance is a constant process that requires vigilant oversight, attention to detail, and modification. The concept of "constantly improving the [environmental] position" is adapted from Major Geoffrey Corn, Professor, International & Operational Law Division, The Judge Advocate General's School, U.S. Army. Major Corn instructs students that they must constantly ensure that the commander monitors and improves his environmental posture level during MOOTW to avoid adverse media publicity.

108. See *id.* paras. 1-5 (providing an overview of the current situation, the aim of the environmental procedures, the policy of weighing military necessity against the effect that operations will have on the environment, and legal and financial considerations).

109. *Id.* para. 6b(3) (defining the term hazardous waste and detailing the precise procedures for hazardous waste clean-up and disposal).

110. *Id.* para. 6b(4)-(5) (providing a detailed overview of hazardous waste management considerations and delineating procedures for the transport of hazardous waste).

111. *Id.* para. 6c (providing an overview of the hazardous waste management system, including contaminated site remediation).

112. *Id.* para. 6c(4) (setting forth the procedures for petroleum oil and lubricant (POL) spills).

113. *Id.* para. 6c(7) (providing an overview for flora and fauna protection).

114. *Id.* para. 6c(8) (providing the procedures for archaeological and historical preservation).

standards.<sup>115</sup> The operational plan designates the engineer staff section as the point of contact for major environmental incident reporting and places the responsibility for environmental policy development and coordination on the chief engineer.<sup>116</sup> The operational plan also integrates, to some extent, guidance for civilian contractors who perform environmental tasks.<sup>117</sup>

The operational plan's environmental protection requirements are "weighed against the military necessity of the mission."<sup>118</sup> It advises the deploying force that, "[w]hile the requirements of [Operation Joint Guard's] missions will take precedence, the potential dangers and high media profile of environmental issues requires thorough consideration and awareness of the potential environmental impacts of [Operation Joint Guard's] operations."<sup>119</sup> This statement imparts the overarching importance that environmental considerations are playing in the highly political Operation Joint Guard mission. Although the military mission is not subordinate to environmental considerations, it does appear that the successful completion of the military mission is partially dependent on the competent execution of the environmental mission.

### C. The Continuum of Contingency Operations — An Application of the Concept of Environmental Justice to Overseas Operations

The continuum of contingency operations that have occurred since 1992 illustrates the increasing levels of U.S. environmental awareness. At one end of the spectrum is the Somali operation, which demonstrates the low priority that environmental considerations played in a deployment to an impoverished country that was devoid of a sovereign government. At the center of the spectrum is the Haitian deployment, where there existed some evidence of planning for environmental considerations; yet, the environmental plan lacked focus and was poorly executed. Finally, at the other

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115. *Id.* annexes A through F.

116. *Id.* para. 6b(4). See JCS PUB. 4-04, *supra* note 77. Joint doctrine mandates that civil engineering planning is an integral part of the joint operation planning process conducted under the JOPES. Joint civil engineering operations are planned and conducted with consideration of how they affect the environment, in accordance with applicable host nation agreements, U.S. environmental statutes, regulations, and policies. *Id.* at II-7.

117. See OPERATION JOINT GUARD ENVIRONMENTAL ANNEX, *supra* note 107, annexes A through F.

118. *Id.* para. 3.

119. *Id.*

end of the spectrum is the Bosnian deployment, which demonstrates that U.S. environmental planning is actually driven by adherence to international environmental obligations, standards, and political considerations, and is given high priority when compliance is essential to executing the military mission. Environmental planning in Bosnia is assuming a high command priority and is integrated into every aspect of the operation because of the location of the operation in a wealthy European theater, the involvement of other European nations, and the close scrutiny of this operation by the civilian populace and the media.

This continuum contradicts the notion of environmental stewardship articulated in the *United States Army Environmental Strategy into the 21st Century*.<sup>120</sup> It illustrates a discretionary environmental stewardship program where the level of environmental planning and execution is often driven by the military mission and the accompanying public affairs threat level. This continuum also highlights the continued need to apply the domestic concept of environmental justice to DOD activities in the international community. The definition of "environmental justice,"<sup>121</sup> in the domestic context, is achieving "equal protection from environmental and health hazards for all people regardless of race, income, culture, or social class."<sup>122</sup>

During the last decade, environmental justice evolved from being applicable strictly to domestic based issues to being applicable in the international context.<sup>123</sup> For example, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal reflects the emerging concept of environmental justice in an international

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120. See generally U.S. ARMY ENVIRONMENTAL STRATEGY, *supra* note 4.

121. Generally, the emerging concept of environmental justice is a hot environmental issue in the White House and the Environmental Protection Agency. See Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, Exec. Order No. 12,898, 59 Fed. Reg. 7629 (1994). President Clinton issued EO 12,898 on 11 February 1994. The measure requires federal agencies to identify and to address disproportionately high and adverse human health and environmental effects of federal programs, policies, and activities on minority and low-income populations. *Id.* See Steven A. Herman, *Enforcement Helps Realize EPA's Commitment to Environmental Justice to Improve People's Lives*, 12 NAAG NAT'L ENVTL. ENFORCEMENT J. 9 (1997) (describing the impact of EO 12,898 on environmental programs).

122. Kelly Hill and Linda Murakami-Sikkema, *Environmental Justice: A Matter of Perspective*, 12 NAAG NAT'L ENVTL. ENFORCEMENT J. 3 (1997). See generally Steven Light and Kathryn Rand, *Is Title VI a Magic Bullet? Environmental Racism in the Political-Economic Processes and Imperatives*, 2 MICH. J. RACE & L. 1 (1996) (describing the overarching principles of the environmental justice movement).

context.<sup>124</sup> The underlying basis for the Basel Convention is the international community's concern that modern, developed countries are avoiding the high cost of environmentally sound hazardous waste treatment and disposal methods by shipping their wastes to poorer, underdeveloped countries for disposal under environmentally damaging conditions.<sup>125</sup>

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**123.** See ENVIRONMENTAL LAW ANTHOLOGY, *supra* note 90, at 432. According to professors D'Amato and Engel, in today's modern world, the lesser-developed countries are increasingly stressing their sovereign independence and insisting that the developed states "acknowledge a duty to reduce the material disparities of their wealth." *Id.* In the environmental arena, lesser-developed countries are demanding corrective justice for environmental damage.

India. . . demand[ed] that the developed nations compensate her \$2 billion as a precondition of signing the Montreal Protocol [concerning ozone depletion] on the grounds "that since it is the Western nations that caused the ozone depletion, it is their moral responsibility to transfer technology for CFC [chlorofluorocarbons] substitution." The developed countries are to blame, they should pay what it costs to clean it up.

*Id.* at 433.

**124.** See Basel Convention, *supra* note 46. The negotiations leading to the Basel Convention were difficult and controversial. This was due to the political sensitivity of the issue between developed nations and underdeveloped nations. Professors D'Amato and Engel aptly describe this sensitivity:

During the mid-1980's the political discussion of the issue of international transports of hazardous wastes in general, and that of illegal transboundary traffic in such wastes in particular, had gathered momentum, reaching its culmination with widely publicized media reports on incidents involving the illegal dumping of toxic wastes from industrialized nations in the Third World countries in 1988. These issues prompted an international outcry against such practices and led to increasing awareness of the issue on the national and international level. . . . The elaboration of the Basel Convention was seen by many primarily as an opportunity to put a stop to illegal international waste traffic from North to South. A substantial number of developing countries, led by member states of the Organization of African Unity (OAU), regarded the deliberations as an opportunity to demonstrate their solidarity in refusing to tolerate the use of their territories as dumping grounds for toxic wastes from the rich States of the industrialized world. . . . On the other hand, many industrialized states, focusing on the option of controlled waste traffic, were not prepared to agree with the proposed measures which would put too many restrictions on the trade in wastes and recyclable materials among industrialized States. Disagreement between developed and undeveloped countries also arose on other key issues.

Operation Joint Endeavor aptly demonstrates the Basel Convention's impact on military forces<sup>126</sup> by prohibiting the transit of U.S. generated hazardous waste across the borders of many European countries in the region.<sup>127</sup>

### III. Current Changes Afoot in Environmental Standards Applicable During Overseas MOOTW

The environmental justice concept is driving the White House to tighten environmental standards and to increase environmental documentation requirements that apply to DOD actions during overseas contingency operations. An examination of the current changes afoot in this area is valuable in assessing the DOD's future planning in this arena. The ongoing changes that affect DOD environmental considerations during contingency operations are directly related to the 1993 District of Columbia Circuit Court decision in *Environmental Defense Fund v. Massey*,<sup>128</sup> which applied the NEPA extraterritorially to the global commons of Antarctica.<sup>129</sup> After the Clinton administration chose not to appeal the court's decision in *Massey*, the President directed a review of the policy concerning federal actions that have environmental impact overseas. The review is documented in Policy Review Directive (PRD) 23.<sup>130</sup>

During the process leading to PRD 23, the National Security Council led an interagency effort to make recommendations to Congress on whether the NEPA should be applied overseas, whether EO 12,114 should be retained, or whether a mixed approach should be adopted.<sup>131</sup> One anticipated outcome of the PRD 23 process is a possible modification of EO 12,114. The modification would require the onerous NEPA-like environmental analysis documentation for all major federal actions overseas.<sup>132</sup> This process could potentially strip the combatant commander of his dis-

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125. See ENVIRONMENTAL LAW DESKBOOK, *supra* note 50, at 36-15.

126. See *supra* Section III.B.3.

127. The proposed Transboundary Environmental Impact Assessment Agreement (TEIA) among the governments of Canada, Mexico, and the United States also demonstrates this trend of applying the environmental justice concept in the international arena. The agreement includes provisions that commit the parties to reach bilateral agreements concerning the environmental impact of proposed projects that are subject to decisions by each government and are likely to cause significant adverse transboundary effects.

128. 986 F.2d 528 (D.C. Cir. 1993).

129. *Id.*



cretion in applying the "participating nation" exception to overseas contingency operations.<sup>133</sup>

In an effort to avoid the expansion of EO 12,114, the chairman of the Joint Chiefs of Staff is actively involved in negotiating and drafting an instruction to replace *DOD Directive* 6050.7.<sup>134</sup> The desire to preserve the combatant commander's discretion regarding the participating nation exception and to preserve the procedures that are currently defined by EO 12,114 fuels the efforts of the Joint Chiefs of Staff.<sup>135</sup> The President's Council on Environmental Quality (CEQ) recently rejected the draft instruction because of the broad range of actions that would be delegated to the combatant commander.<sup>136</sup> The CEQ's rejection could pave the way for a new executive order that would limit the DOD's ability to avail itself

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130. Presidential Review Directive/NSC-23, United States Policy on Extraterritorial Application of the National Environmental Policy Act (NEPA) (8 Apr. 1993) [hereinafter PRD 23]. The goal of PRD 23 was to review whether, as a matter of policy, the NEPA should have global applicability. Although the PRD 23 process is not officially completed, the review process is temporarily on hold pending a decision on the TEIA. See *supra* note 127 and accompanying text. Implementation of the TEIA could significantly impact environmental documentation requirements for federal actions with transboundary effects on Canada and Mexico. Within the Joint Chiefs of Staff, there is some speculation that the President's Council on Environmental Quality (CEQ) is using the TEIA process to impact the PRD 23 process, resulting in the extraterritorial application of the NEPA either through legislative amendment to the NEPA or as implemented by revisions to EO 12,114. Telephone Interview with Commander Jonathan P. Edwards, U.S. Navy Maritime and Environmental Policy, Joint Staff, J-5 (Feb. 26, 1998) [hereinafter Edwards Interview].

131. Edwards Interview, *supra* note 130.

132. See Phelps, *supra* note 51, at 85.

133. See Memorandum from Commander in Chief, U.S. Atlantic Command, Captain Stephen A. Rose, subject: Draft Comments to DOD Instruction 4715.XX (3 May 1996) [hereinafter Rose Memorandum] (on file with author). In his memorandum, Captain Rose explains that one intent of Draft DOD Instruction 4715.XX is to provide a measure for the DOD to ward off a new, more restrictive executive order to replace EO 12,114.

134. See DRAFT INSTR. 4715.XX, *supra* note 25.

135. Telephone Interview with Major Thomas Ayres, U.S. Army Environmental Law Division, Office of the Judge Advocate General (Jan. 9, 1998) [hereinafter Ayres Interview]. See Edwards Interview, *supra* note 130. The Joint Chiefs of Staff rejected the current Draft Instruction 4715.XX because it eliminates the participating nation exception. The new provision may have a serious impact on DOD activities during contingency operations, as well as on bilateral military relationships with countries in the respective combatant commander's area of responsibility. In fact, the new provisions may be interpreted by other nations as piercing their sovereignty based on the extraterritorial application of the NEPA. The negotiations over this matter represent a delicate balancing act by the DOD and the Joint Chiefs of Staff due to a threat by the CEQ that the President may impose the onerous burdens of the NEPA across the full spectrum of federal actions overseas, including overseas contingency operations. See Rose Memorandum, *supra* note 133, para. 3.

of categorical exclusions, exemptions, and exceptions, specifically the “participating nation” exception. Alternatively, the CEQ’s rejection could simply signal that the current White House administration has placed this issue on hold until considerations are ripe for a political decision in this environmental arena.

#### IV. The Impact of Change on Environmental Considerations During Contingency Operations—A Proposal for True Environmental Stewardship

The impact of PRD 23 and the threat of a more restrictive executive order represent far-reaching and negative implications for regional combatant commanders. This is primarily due to the severe reduction in the combatant commander’s discretion, which is currently preserved under EO 12,114 and *DOD Directive 6050.7*.<sup>137</sup> To avoid this result, the armed forces must integrate environmental doctrine into training exercises. Further, the military must integrate a standardized environmental plan into all phases of MOOTW and ensure execution in accordance with the plan. This process translates into a standardized environmental packet for each contingency operation, regardless of whether the operation occurs in a third world nation, like Somalia, or in a wealthier European theater of operations. A self-imposed, sound environmental packet during contingency operations may temper the President’s perceived need to impose stricter environmental standards in the form of a new executive order.

##### A. A Crying Need for Joint Doctrine—The Missing Link

Joint operations are the conceptual heart of future operations at all levels involving war and MOOTW. With the renewed emphasis on joint

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136. Ayres Interview, *supra* note 135. See Edwards Interview, *supra* note 130. The CEQ works directly for the Executive Office of the President of the United States. The CEQ has not historically been empowered to make unilateral determinations concerning the federal government’s assessment of environmental impacts outside the United States. Since 1979, however, the executive branch’s policy has been codified in executive orders, not CEQ guidance. In terms of implementation oversight, EO 12,114 assigns this responsibility jointly to the CEQ and the Department of State, making it clear that the CEQ does not have unilateral authority. See generally EO 12,114, *supra* note 22. See also Memorandum from General Counsel, Executive Office of the President, Council on Environmental Quality, Dinah Bear, subject: CEQ’s Response to Letter from State Department Acting Legal Adviser to CEQ Guidance (1 July 1997) [hereinafter Bear Memorandum] (on file with author).

operations required by the Goldwater-Nichols Reorganization Act of 1986,<sup>138</sup> only those “aspects of operations that require coordination among the services or that provide guidance to joint and unified commands” have driven joint doctrine.<sup>139</sup> In furtherance of the Goldwater-Nichols Act, “Joint Vision 2010” embodies the joint operations concept and projects a “holistic” perspective of integrating the separate services for achieving full spectrum dominance across the range of military operations.<sup>140</sup> Joint operational planning involving all of the services drove the recent deployments to Somalia, Haiti, and Bosnia. Accordingly, joint doctrine<sup>141</sup> must drive environmental planning and execution, with supplemental guidance from the respective services. Traditionally, individual service components handle overseas environmental matters. Consequently, in the past, there was little perceived need at the Joint Chiefs of Staff level to incorporate environmental guidance in joint publications.<sup>142</sup>

The new generation of contingency operations, however, calls for full-spectrum Joint Chiefs of Staff level environmental doctrine. Currently, one small section of a joint publication addresses environmental issues and places responsibility for all environmental issues on the civil engineer section.<sup>143</sup> At least one commentator has observed that current

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137. Draft Instruction 4715.XX represents a significant erosion of the combatant commander's discretion from previous environmental requirements under EO 12,114 and *DOD Directive 6050.7*. For example, the most significant change requires DOD components to approach host nations for major combined activities short of armed conflict (for example, exercises and MOOTW) that do not qualify for a national security exemption. The DOD component must also: (1) determine if the host nation is conducting an environmental analysis; (2) obtain the host nation's procedures and apply them to DOD activities; (3) offer to assist in an analysis if the host nation does not have an analysis regime; and (4) if the host nation refuses to cooperate, the DOD component may decide to proceed only after considering the consequences of proceeding on the basis of whatever environmental information is readily available. See DRAFT INSTR. 4715.XX, *supra* note 25. Executive Order 12,114 does not currently require this procedure. The EO allows a “participating nation” to determine what environmental review, if any, it will apply to combined DOD activities in its territory. See Rose Memorandum, *supra* note 133, para. 3. Draft Instruction 4715.XX also drastically limits the combatant commander's discretion by: (1) delegating approval authority for certain actions to the environmental executive agent, rather than leaving this issue solely to the discretion of the combatant commander; (2) requiring the combatant commander to consult with the EEA on several actions; (3) requiring the combatant commander to offer to assist a participating nation with environmental analysis, rather than allowing the combatant commander to make the determination that, under certain circumstances and in certain nations, this offer may not be appropriate. *Id.* encl. 1.

138. 10U.S.C.A. § 151 (West 1998).

139. JOSEPH C. CONRAD, U.S. DEP'T OF ARMY, WHITE PAPER, ENVIRONMENTAL CONSIDERATIONS IN ARMY OPERATIONAL DOCTRINE 4-2 (1995).

environmental doctrine is “woefully lacking in content, making it inadequate for use as the definitive source of joint guidance for environmental policy during MOOTW.”<sup>144</sup> Even more disturbing, a recent study indicates that “current joint doctrine does not adequately reflect the full spectrum of roles, responsibilities, and capabilities of engineers during joint and combined operations.”<sup>145</sup> The study reports that “there is no clearly defined program of engineer doctrine in the joint publication hierarchy, [and] what doctrine does exist is incomplete and at times contradictory.”<sup>146</sup> The report concludes that “sufficient engineer resources to satisfy all requirements will probably not be available in all contingencies.”<sup>147</sup>

The delegation of environmental issues to a single joint staff section, the engineer section, that is not adequately equipped or manned to deal with its own doctrinal mission further highlights the overwhelming need for the Joint Chiefs of Staff to increase the emphasis on environmental issues. Accordingly, new joint doctrine must assign the responsibility for environmental concerns across all staff sections and assign the primary responsibility for environmental execution to the J-3 (operations) section. The J-3 delegation will ensure that environmental planning is integrated

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140. See Colonel John Clauer, *Future Warfare — Preparing for the 21st Century*, at 6-7 (undated) (unpublished manuscript, on file with the Int'l & Op. L. Dep't, The Judge Advocate General's School, U.S. Army). Joint Vision 2010 provides a vision statement for how joint operations and joint forces will be conducted in the year 2010. The vision builds on the strengths of each of the separate services by “integrating new and emerging technologies with operational concepts that will provide significant improvements” in joint warfighting capabilities. *Id.* at 6.

The J-7 (Operational Plans and Interoperability) is the Joint Staff proponent for JV 2010 implementation. The JWFC [joint warfighting center] is the primary action agency for program management, for developing related joint concepts, and for oversight of the implementation process. A Chairman Joint Chiefs of Staff Instruction (CJCSI) 3010.01, “Chairman's Joint Vision 2010 Implementation Policy,” will provide the policy and procedures associated with this process.

*Id.* at 11. See Chairman of the Joint Chiefs of Staff, *Concept for Future Joint Operations: Expanding Joint Vision 2010*, <<http://www.dtic.mil/doctrine/jv2010/cfjoprml.pdf>> [hereinafter *Concept for Future Joint Operations*].

141. Doctrine is the military's statement of how it intends to conduct war and MOOTW. It establishes a shared approach to operations and serves as a vehicle for organizational and physical change. Guidance, including tactics, techniques, and procedures, flows from the doctrine. See generally JOINT CHIEFS OF STAFF, JOINT PUB. 3-0, DOCTRINE FOR JOINT OPERATIONS (9 Sept. 1993) [hereinafter JOINT PUB. 3-0].

142. See CONRAD, *supra* note 139, at 4-2.

throughout the entire spectrum of the operational planning process. At the very minimum, other staff sections that must be included in this process

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143. See JOINT PUB. 4-04, *supra* note 77, at II-7, II-8. The current doctrine provides the following scant guidance:

4. Environment.

a. Joint civil engineering operations should be planned and conducted with appropriate considerations of their effect on the environment in accordance with applicable US and HN [host nation] agreements, environmental laws, policies, and regulations.

b. All joint civil engineering operations planned and conducted within the United States and US territories and possessions will be conducted in compliance with all applicable federal, state, or local environmental laws and standards. This includes the preparation of adequate environmental documentation and coordination with the federal and state environmental, natural resources, and historic preservation agencies.

c. Early planning is essential to ensure that all appropriate environmental reviews have been completed in accordance with DODD 6050.7, "Environmental Affects Abroad of Major Department of Defense Actions," and the Overseas Environmental Baseline Guidance and applicable Final Governing Standards, and that no [HN] environmental restrictions are required by the status-of-forces agreements or other international agreements. Additionally, a separate annex or appendix for ensuring that proper attention is given to environmental considerations should be included in each **OPORD** [operation order] and **OPLAN** [operational plan] under which units will deploy. The annex or appendix should include, but not be limited to, the major sections shown in Figure 11-4.

*Id.* at 11-8. Assuming that this current minimal joint doctrine is inadequate, there is inadequate Army environmental doctrine that applies to MOOTW. For example, *Field Manual 100-23*, the Army's manual on peace operations is devoid of a discussion on environmental considerations during MOOTW. See generally FM 100-23, *supra* note 7. The Army, however, is taking a step in this direction by incorporating environmental issues into Army doctrine. See CARR, *supra* note 10, at 26 (listing field manuals that will include some minimal guidance on environmental issues).

144. CARR, *supra* note 10, at 22.

145. *Id.* at 21 (citing CONTINGENCY ENGINEERING DOCTRINE SUBGROUP, A WHITEPAPER FROM THE JOINT ENGINEER COMMUNITY ON THE NEED FOR JOINT CONTINGENCY ENGINEERING DOCTRINE (1996) [hereinafter **ENGINEERING DOCTRINE**]).

146. **ENGINEERING DOCTRINE**, *supra* note 145.

147. CARR, *supra* note 10, at 21 (citing **ENGINEERING DOCTRINE**, *supra* note 145 (referring to a broad range of engineer support and operations including environmental management and oversight)).

include: preventive medicine, safety, comptroller, logistics, legal, and medical.<sup>148</sup>

Although *Joint Publication 4-04*<sup>149</sup> is inadequate for environmental planning and execution, there are two provisions that must be preserved for

148. See INTEGRATING U.S. ARMY ENVIRONMENTAL STRATEGY, *supra* note 3, app. B. When the entire functional staff includes environmental considerations in planning and execution, they will be able to deal efficiently with environmental considerations and environmental compliance, similar to protections afforded to civilians and other noncombatants. True environmental planning, execution, and compliance can no longer be the "show" of one staff section. At least one scholar in this area offers suggested examples of environmental functions for each member of the functional staff. The author has tailored these functions slightly to meet the requirements of the MOOTW mission:

Operations Officer (J-3/G-3/S-3): Primarily responsible for orchestrating the environmental contingency plan. Prepare recommendations for adjusting plans to prevent the destruction of critical environmental resources in specific geographic areas. Prepare recommendations as to the probability and significance of damaging natural and cultural resources.

Intelligence Officer (J-2/G-2/S-2): Coordinates with the civil affairs officer, the engineer, and the medical officer to identify critical environmental vulnerabilities of the area and the population. Includes environmental vulnerabilities in the "intelligence preparation of the battlefield" process to prevent costly environmental claims.

Logistics Officer (J-4/G-4/S-4): Monitors the use of hazardous materials. Plans for the appropriate disposal of solid and hazardous waste. Ensures spill plans for extended operations are prepared as appropriate.

Personnel Officer (J-1/G-1/S-1): Coordinates with the public affairs officer and with the operations officer for educating all military personnel concerning individual environmental responsibilities. Ensures the necessary level of environmental expertise is assigned to the command.

Civil Affairs Officer (J-5/G-5/S-5): With the assistance of host nation civil authorities, determines the location of critical environmental resources, assets, and facilities to prevent environmental degradation and to ensure proper disposal of solid and hazardous wastes. Recommends to the commander those resources that should be afforded special considerations for protection because of value to the mission, public health concerns, danger of regional or global contamination, environmental claims, post-conflict clean-up costs, or economic viability of the area.

Legal Officer: Researches and pinpoints the legal requirements for environmental actions in the theater, to include treaties, international agreements, and host nation laws. Advises the commander in advance of deployment of the peculiar aspects of environmental compliance during MOOTW.

Staff Engineer: Provides technical advice to the commander and staff concerning issues of public health effects of planned courses of action, water and wastewater treatment, disposal of solid and hazardous waste.

Medical Officer: Provides commander and the staff with technical advice concerning host nation population and military personnel health issues. Provides advice on the health implications of water and wastewater treatment, hazardous and solid waste disposal, and medical waste treatment and disposal.

149. See generally JOINT PUB. 4-04, *supra* note 77.

future joint environmental doctrine.<sup>150</sup> The first provision requires a separate environmental annex in each operational plan.<sup>151</sup> Integrating the annex into all phases of operational planning ensures the planners' attention to environmental considerations during contingency operations. The joint staff has made some progress in developing a standardized environmental annex, Annex L,<sup>152</sup> of the JOPES. The JOPES then incorporates Annex L as a planning document.<sup>153</sup> Unfortunately, at the time of this writing, there is no evidence of Annex L's incorporation into the operational planning for either Operation Joint Endeavor or the current Bosnian operation, Operation Joint Guard.<sup>154</sup> This is more than likely due to the current lack of joint environmental doctrine and the infancy of Annex L.<sup>155</sup> The annex, however, is no more than an undeveloped, bare bones sketch of environmental considerations.<sup>156</sup> At the joint staff level, there is a need to

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150. See CARR, *supra* note 10, at 22.

151. See JOINT PUB. 4-04, *supra* note 77, at II-7.

152. See JCS MANUAL 3122.03, *supra* note 80, annex L.

153. See *id.*

154. See generally Operation Joint Guard Environmental Annex, *supra* note 107.

155. The Judge Advocate General of the U.S. Navy, Rear Admiral John D. Hutson, recently commented: "We [the United States] are at the stage in environmental considerations during contingency operations where we were ten to fifteen years ago in operational law. We, as judge advocates, must do more to educate our leaders and to catch up." Rear Admiral John D. Hutson, U.S. Navy, Address at the Leadership and Management Lecture Series to the 46th Graduate Course, The Judge Advocate General's School, U.S. Army (Mar. 20, 1998).

156. See JCS MANUAL 3122.03, *supra* note 80, annex L. Annex L is basically devoid of any substantive environmental guidance. For example, Annex L, para. 3a, "Concept of the Operation," does not address potential treaty obligations, transport of hazardous wastes across international borders, or the preparation necessary to ensure that units deploy with the requisite environmental equipment, such as hazardous waste disposal containers, spill containment, clean up kits, and materials to cover the potential release of hazardous materials during transport. The annex is also devoid of guidance for documenting entry and exit environmental conditions to prevent fraudulent claims by the host nation or procedures for incident reporting. Additionally, Annex L does not factor into the environmental plan the use of United States and host nation government contractors. The foregoing are all substantive environmental areas that should be covered in every MOOTW environmental annex, regardless of the plan's operational level.

integrate environmental considerations into every aspect of MOOTW planning.

The section of *Joint Publication 4-04* that identifies the elements of environmental planning also must remain part of joint doctrine. These elements include:

- \*Policies and responsibilities to protect and preserve the environment during the deployment;
- \*Certification of local water sources by appropriate field units; and
- \*Solid and liquid waste management:
  - Open dumping;
  - Open burning;
  - Disposal of gray water;
  - Disposal of pesticides;
  - Disposal of human waste;
  - Disposal of hazardous waste;
  - Hazardous materials management including the potential use of pesticides;
  - Flora and fauna protection;
  - Archeological and historical preservation; and
  - Base field spill plan.<sup>157</sup>

These factors, however, should not be confined to a single environmental annex. Integrating the environmental elements throughout the entire operational plan is essential for developing a sound environmental posture level for a theater of operations. To address environmental planning elements thoroughly throughout the entire operations spectrum, the JOPES must incorporate environmental issues in the broad range of annexes, including operations; logistics; and planning guidance for personnel, public affairs, oceanographic operations, and medical services. Environmental planning considerations pervade all aspects of a contingency operation; therefore, operators must incorporate environmental planning into all portions of the operational plan.<sup>158</sup>

## B. The Critical Need for Detailed Off-the-shelf Operational Plans

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157. JOINT PUB. 4-04, *supra* note 77, at II-8.



Operational law attorneys must be sensitive to environmental planning in their review of operational plans. Development of off-the-shelf environmental annexes, which are similar to off-the-shelf operational plans for contingencies worldwide, is essential. The plans must incorporate applicable international agreements, SOFAs, and host nation laws for specific areas of the world.<sup>159</sup> This type of operational plan development, prior to an actual contingency operation, ensures that planners do not overlook or neglect environmental planning and stewardship, as the operational

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158. Currently, the chairman of the Joint Chiefs of Staff is revising *Joint Publication 4-04*. Message, 0820522 Nov 96, Joint Staff, J7, subject: Minutes of the Joint Doctrine Working Party — Program Directive for Joint Publications 3-34, Engineer Doctrine for Joint Operations (8 Nov. 1996). The revision will not attempt to address the entire spectrum of environmental issues; it will address only those issues that relate to civil engineering operations. Also, the chairman of the Joint Chiefs of Staff is creating *Joint Publication 3-34* and has assigned the task to the Army as the lead agent. *Joint Publication 3-34* will include operational planning, environmental stewardship, mitigation and restoration, and waste disposal. See Electronic Mail Message, Joint Doctrine Web Site (doctrine@netcom.com) subject: Question on Joint Publication 3-34, Engineer Doctrine for Joint Operations (Mar. 10, 1998) (on file with author); Edwards Interview, *supra* note 130. *Joint Publication 3-34* will also create the Joint Environmental Management Board (JEMB). The JEMB is intended to integrate all environmental protection programs of all service components under a single authority. This should provide the requisite command and control of environmental protection in overseas MOOTW. The JEMB will: participate in the operational planning process by providing environmental intelligence reports, assessments, and environmental management requirements to the joint task force commander; establish combatant commander and joint task force commander environmental policies, procedures, and priorities; and provide much needed oversight of environmental protection standards and compliance. See CARR, *supra* note 10, at 22.

159. Although the overseas environmental baseline guidance documentation (OEBGD) and final governing standards (FGS) apply only to DOD installations and facilities overseas and do not specifically apply to operational deployments, such guidelines can be used as a basis for developing the operational plan for a specific regional area. See DOD INSTR. 4715.5, *supra* note 27. A proposed solution is for the DOD to contract out for the preparation of off-the-shelf environmental annexes for possible hot spots in the world where deployments are expected to occur. Additionally, in the event that the President replaces EO 12,114 with a new executive order that eliminates the “participating nation” exception, thereby increasing documentation requirements, the DOD could also contract out for the preparation of such documentation (such as EIS, ER, ES, and EA). Similar to the LOGCAP contract employed by the DOD during MOOTW for tailor-made packages for base operations worldwide, this contract would ensure that tailored off-the-shelf plans and, if necessary, documentation requirements, are prepared well before a deployment. Further, the contract would ensure that the plans incorporate current treaty law and the peculiarities of specific host nation laws concerning the environment. In the era of the drawdown of uniformed forces, the use of contractors will act as a force multiplier by allowing uniformed personnel to focus on the primary MOOTW mission.

lessons learned from Somalia and Haiti indicate they have done previously. This also ensures that proper environmental planning and execution is incorporated into training exercises. This educational process is necessary for integrating environmental considerations into MOOTW. All soldiers must appreciate and practice environmental stewardship during training exercises so that environmental execution actually occurs during a deployment.<sup>160</sup>

An excellent example of environmental planning is draft Annex L to Headquarters, U.S. European Command (EUCOM), Plan 4000-98.<sup>161</sup> Plan 4000-98 uses Annex L of the JOPES format for structure. Unlike Annex L, however, Plan 4000-98 covers myriad environmental guidance and regulations, such as EO 12,114, *Joint Publication 4-04*, and *DOD Directive 6050.7*. Additionally, the plan incorporates the full spectrum of environmental legal issues—provisions for applicable treaties, international agreements, SOFAs, host nation environmental restrictions, and service regulations. The plan also integrates other staff sections—preventive medicine, surgeon, safety, legal, logistics, personnel, civil affairs, and the engineer section—into environmental planning and execution.<sup>162</sup>

Building on the experiences of Operation Joint Endeavor concerning the transit of hazardous wastes, the draft plan also includes guidance that the authority to transit hazardous wastes will be negotiated prior to the deployment of U.S. forces.<sup>163</sup> This plan goes far beyond the environmen-

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160. See FM 100-23, *supra* note 7, at 1. The individual soldier must have an understanding of the importance of complying with environmental standards to ensure not only the operational success, but also the media success, of every peace operation.

Because peace operations are usually conducted in the full glare of worldwide media attention, the strategic context of a peace operation must be communicated and understood by all involved in the operation. Soldiers must understand that they can encounter situations where the decisions they make at the tactical level have immediate strategic and political implications . . . Failure to fully understand the mission and operational environment can quickly lead to incidents and misunderstandings that will reduce legitimacy and consent and result in actions that are inconsistent with the overall political objective.

*Id.*

161. United States European Command, Standard Plan 4000-98 (6 Oct. 1997) (on file with author) [hereinafter Plan 4000-98]. See Burman and Hollingsworth, *supra* note 18, at 27.

162. See generally Plan 4000-98, *supra* note 161.

163. *Id.* at 2.

tal planning elements in current joint doctrine and incorporates a broader range of specific environmental issues, including: formats for documenting initial environmental conditions to avoid fraudulent claims; plans for local host nation contracts for disposal; incident report procedures; and environmental procedures for the exit and redeployment of troops from the theater of operations.<sup>164</sup>

### C. The Need for Joint and Service Doctrine that Fully and Competently Integrates Civilian Contractors into the Environmental Plan

In today's era of budget and personnel cuts, uniformed forces increasingly rely on civilian contractors to serve as a force multiplier in performing military missions.<sup>165</sup> Presidential and congressional caps on troops during peace operations increase the need for civilian contractors. Troop caps significantly affect the environmental support mission.<sup>166</sup> Accordingly, the Joint Chiefs of Staff and the respective services must create doctrine that focuses on incorporating the civilian contractor into the execution of the environmental mission.

In 1985, the Army initiated the LOGCAP program to provide off-the-shelf advance planning for the use of civilian contractors during MOOTW and to coordinate sources of available civilian logistics assets in the United States and overseas.<sup>167</sup> During Operations Joint Endeavor and Joint Guard, the DOD used the LOGCAP contract to augment military forces in the area of environmental support services such as latrine services; sewage and solid waste removal and disposal; and water production, storage, and distribution.<sup>168</sup>

Despite this increasing use of civilian contractors, the U.S. General Accounting Office (GAO) recently concluded, in a report concerning the Bosnian mission, that "little doctrine on how to manage contractor

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164. *Id.* A proposed synthesis for a sound and balanced environmental annex that extracts and summarizes the concepts found in *Joint Publication 4-04*, Plan 4000-98, the Operation Joint Endeavor Environmental Annex, and the JOPES Annex L is located at Appendix 2 of this article. This annex constitutes a concrete vision of what an excellent, well-balanced, and thorough environmental annex should include.

165. The use of civilian contractors to augment U.S. forces during military operations is not a new method for force multiplication. The U.S. Army has traditionally employed civilian contractors in noncombat roles to augment military forces. For example, civilian contractors were used extensively in the Korean and Vietnam ~~Wars~~ ~~was~~ to augment logistical support provided to U.S. forces. See GAO REPORT, *supra* note 85, at 1-2.

resources and effectively integrate them with force structure units exists.”<sup>169</sup> The report further concluded that the DOD did not provide EUCOM officials with adequate contract planning guidance, adequate information on contractor capabilities, sufficient contract management and integration strategies, or adequate oversight methods and responsibili-

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166. There are three key planning considerations for using civilian contractors during MOOTW: (1) the ability to respond rapidly to major regional conflicts; (2) the political sensitivity of activating guard and reserve forces to respond to these regional conflicts; (3) the lack of host nation support agreements in the underdeveloped countries in which MOOTW traditionally occur; and (4) the NCA's desire to maintain a relatively low United States presence in MOOTW. *See generally* *id.*; *RESTORE HOPE AAR, supra* note 62; *UPHOLD DEMOCRACY AAR, supra* note 70; *JOINT ENDEAVOR AAR, supra* note 17. For example, during Operation Joint Endeavor, the Joint Chiefs of Staff told U.S. Army Europe not to expect authorization for more than 25,000 troops: 20,000 in Bosnia and 5000 in Croatia. Additionally, U.S. Army Europe had a ceiling on the reserve forces it could use. For Bosnia, the President authorized the call-up of 4300 reservists for all the services, 3888 of whom the DOD allocated to the Army. Once the Army used its allocation to activate key support capabilities for civil affairs and psychological operations units, there was little opportunity to call up other types of support units. *See* GAO REPORT, *supra* note 85, at 8; *JOINT ENDEAVOR AAR, supra* note 17. *See also* 10 U.S.C.A. § 12304 (West 1998) (authorizing the President to call up to 200,000 selected reservists for up to 270 days without a national emergency). On 8 December 1995, the President signed Executive Order 12,982 to authorize the activation of reserve forces. *See* Exec. Order No. 12,892, 60 Fed. Reg. 63,895 (1995). In the age of increasing draw down of the active force and shrinking budget for military operations worldwide, the armed forces may come to depend on environmental support packages that are provided by specialized reserve units designed specifically for providing the requisite environmental expertise.

167. *See generally* GAO REPORT, *supra* note 85. *See also* U.S. DEP'T OF ARMY, REG. 700-137, LOGISTICS CIVIL AUGMENTATION (LOGCAP), para. 1-1 (16 Dec. 1985) (describing the use of civilian contractors in a theater of operations, thereby freeing uniformed armed forces for other missions). This 1985 regulation is outdated and focuses primarily on combat operations. It does not adequately address the current expanded use of civilian contractors during MOOTW.

168. *See supra* Section II.B.3 (detailing the scope of work encompassed by the LOGCAP contract); GAO REPORT, *supra* note 85, at 7.

169. GAO REPORT, *supra* note 85, at 4-5.

ties.<sup>170</sup> Additionally, financial reporting and contract monitoring systems were inadequate.<sup>171</sup>

Although the Corps of Engineers (COE) was responsible for managing LOGCAP, the COE did not have a system to educate properly the key personnel who were tasked with the contract administration mission in the theater of operations. For example, deployed personnel did not have sufficient information to track the cost of the operation, to report on how LOGCAP funds were spent, or to monitor contractor performance.<sup>172</sup> Without adequate information and proper systems, combatant commanders were unable to determine whether the contractor was “adequately controlling costs, if alternative support approaches were cost-effective, if changes in the level of service being provided were warranted, or whether work was performed in accordance with contract provisions.”<sup>173</sup> Consequently, theater personnel used ad hoc, piecemeal procedures and systems to ensure that they were effectively managing LOGCAP.<sup>174</sup>

The DOD publishes little or no doctrine or guidance to assist a combatant commander on the management of the LOGCAP contract, on the integration of the contract into the theater’s force structure, or on the

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**170. *Id.***

**171. *Id.*** The legal advisors who were responsible for coordinating the LOGCAP contract during Operation Joint Endeavor support the GAO findings. For example, one deployed contracting attorney commented: “So my first issue or really a problem was the lack of knowledge. I didn’t know anything about the LOGCAP contract and it was a painful experience learning it in the middle of the deployment. I didn’t have the contract. I didn’t know what the contract said . . .” JOINT ENDEAVOR AAR, *supra* note 17, at 236.

**172.** The LOGCAP contract is a type of cost reimbursement contract referred to as a cost-plus-award-fee (CPAF) contract. Under a CPAF contract, there are no pre-established prices and services. Instead, there are “estimated” and “target” costs, but the government is obligated to pay the contractor for all costs incurred that are reasonable, allowable, and allocable to the contract. Under all cost reimbursement contracts, the government assumes the majority of the risk related to the cost of performance. *See* GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 16.405-2 (Apr. 1, 1984) (describing a cost plus award fee contract). *See also* United States Army Corps of Engineers (USACE), Transatlantic Division, Logistics Civil Augmentation Program (LOGCAP), A USACE Guide for Commanders, at 5 (4 Dec. 1994) [hereinafter LOGCAP Commander’s Guide]. Although this type of contract is more costly than a traditional “fixed-fee” contract, it is necessary for operations during MOOTW due to frequent and unexpected changes that occur during these types of operations. The contract’s scope of work allows greater flexibility for changes without requiring out of scope changes and renegotiation of the contract. *Id.* at 5. As of 6 December 1995, the GAO estimated contract costs for the Bosnian mission at about \$461.5 million dollars. *See* GAO REPORT, *supra* note 85, at 4.

**173.** GAO REPORT, *supra* note 85, at 5.

administration of contractually performed environmental services.<sup>175</sup> Establishing joint and supplemental service component doctrine is essential for the effective and economic management of the LOGCAP contract. Additionally, planners must create a mechanism for integrating the civilian contractor into the commander's environmental operational planning process. Legal advisors who are likely to deploy to a MOOTW theater must receive proper education and information on the LOGCAP contract prior to deployment. The system of oversight required for LOGCAP relies on "vigilant [legal advisors] who have detailed knowledge of the [LOGCAP's] contractual terms."<sup>176</sup> This knowledge will arm the legal advisor with the expertise necessary for the combatant commander's contract oversight, which is directly linked to cost control.<sup>177</sup> At the very minimum, the legal advisor must have access to a copy of the entire LOGCAP contract in order to perform the mission competently.<sup>178</sup> Furthermore, the legal advisor must have sufficient training and experience to assess envi-

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174. Similar criticisms were raised regarding LOGCAP implementation in Somalia and Haiti. See *id.* at 20. The cost reimbursement pricing structure of the LOGCAP contract awards fees based on the quality, responsiveness, and cost control by the contractor. Under the terms of the contract, the evaluations of contractor performance must be reported to the Award Fee Determination Board. Accordingly, there must be a plan to evaluate contractor performance, to communicate the evaluations of performance to the Award Fee Determination Board, and a mechanism available for providing a true assessment of contractor performance. See UPHOLD DEMOCRACY AAR, *supra* note 70, at 134-35. For example, during Operation Uphold Democracy there was initially no plan to evaluate contractor performance or to communicate these evaluations to the Award Fee Determination Board. See Memorandum, Lieutenant Colonel Arthur L. Passar, AMSMI-GC-AL-D, to Staff Judge Advocate, U.S. Army Materiel Command, subject: After Action Report, Legal Support to Joint Logistics Support Command (JLSC), Joint Task Force (JTF) 190, Haiti, Operation Uphold Democracy, September 1994-March 1995, para. 6b(i) (11 May 1995) [hereinafter Passar AAR]. During a change of personnel, Lieutenant Colonel Passar, the new staff judge advocate for the Joint Logistics Support Command (JLSC), Joint Task Force 190, started from scratch in developing an award fee assessment plan. This new plan included worksheets that detailed areas for the JLSC staff to evaluate the contractor's performance for award fee purposes. *Id.* para. 6b(i)(a).

175. According to Army contracting officials during Operation Joint Endeavor, doctrine and guidance on the use of LOGCAP are critical, because using a contractor to support a deploying force represents a significant change from the experiences of most Army personnel. See GAO REPORT, *supra* note 85. Typically, Army practice has been to make the force self-sustaining for the first 30 days in a contingency theater. One Army general likened the "employment of LOGCAP without doctrine and guidance to giving the Army a new weapon system without instructions on how to use it." *Id.* at 17.

176. UPHOLD DEMOCRACY AAR, *supra* note 70, at 135.

ronmental contract performance and associated costs and to provide the required feedback to the award fee determination board.<sup>179</sup>

#### D. The Competent Practice of Environmental Law During Contingency Operations

As part of general operational law practice when participating in an overseas contingency operation, the legal advisor must be intimately familiar with the details of the operational plan. This practice ensures that the legal advisor is trained and prepared to provide competent advice on environmental matters, thereby acting as a force multiplier for the command. The legal advisor must also be closely linked to the operational tempo of the contingency operation. This involves monitoring message traffic, analyzing changes to the operational plan and mission statement

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177. Military commanders during Operation Joint Endeavor were unaware of the cost ramifications of their decisions. For example, a command decision to accelerate the camp construction schedule required the contractor to fly plywood from the United States into the area of operations because sufficient stores were not available in Europe. The contractor reported that the cost for a sheet of plywood flown in from the United States increased from \$14.06 per sheet to \$85.98 per sheet. According to a U.S. Army official, "his commander 'was shocked' to find the contractor was flying plywood from the U.S." GAO REPORT, *supra* note 85, at 18. "The cost reimbursement pricing structure of the LOGCAP is necessary to provide the flexibility and responsiveness required to support military contingency operations, but the corresponding absence of an established price and service schedule demands intensive monitoring and oversight of contractor costs." UPHOLD DEMOCRACY AAR, *supra* note 70, at 135.

178. At first glance, this proposition may seem so basic that it is not worth mentioning. During Operation Joint Endeavor, however, the deploying contract attorney did not have the benefit of a copy of the LOGCAP contract and also did not have the LOGCAP Corps of Engineers points of contact necessary to establish a liaison with the stateside officials who were administering the contract. JOINT ENDEAVOR AAR, *supra* note 17, at 236.

179. For example, during Operation Restore Hope, there was no system available for operational commanders to monitor expenditures, verify expenditures, and tie those expenditures to specific tasks. GAO REPORT, *supra* note 85, at 20. This resulted in great difficulty for commanders in responding to DOD and congressional inquiries about LOGCAP costs. *Id.* In response to many of the criticisms concerning the lack of knowledge in administering the LOGCAP contract, the Department of the Army recently released a three page memorandum concerning contractors on the battlefield. The memorandum is expressly applicable to MOOTW. See U.S. Dep't of Army, Policy Memorandum, subject: Contractors on the Battlefield (12 Dec. 1997). The memorandum is a bare bones description of basic contracting principles and does not adequately address the intricacies of administering the LOGCAP during MOOTW. More must be done to educate military planners, operators, and legal advisors on this issue.

from higher headquarters, and being sensitive to any peculiar host nation law or international treaty applicable to the theater of operations.<sup>180</sup>

Legal advisors must also be knowledgeable on all aspects of environmental compliance in a given regional area, including spill prevention and control, protection of natural resources, and protection of historic and cultural resources. This aspect of the practice includes providing advice to investigating officers on potential violations of host nation environmental laws, international treaties, and regulatory provisions.<sup>181</sup> This effort will also include preparing for the adjudication of environmental claims and practicing preventive law by precluding fraudulent environmental claims. This preventive practice can be accomplished by photographing and documenting the environmental conditions upon arriving in and exiting from the theater of operations.<sup>182</sup>

As an additional proactive measure, once an overseas deployment is announced, the legal advisor should immediately coordinate with the

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180. See, e.g., Plan 4000-98, *supra* note 161, para. 1a(3). This provision states that early attempts will be made to obtain readily available information on applicable host environmental laws and regulations. Additionally, the plan provides that "transit agreements" will be negotiated with all required countries adjacent to the theater of operations in advance of the deployment of U.S. forces. *Id.* para. 1a(5). See Burman and Hollingsworth, *supra* note 18, at 31.

181. See Burman and Hollingsworth, *supra* note 18, at 31. For example, environmental damage could result in host nation real estate damages or claims under the Foreign Claims Act or the International Agreement Claims Act. See Foreign Claims Act, 10 U.S.C.A. § 2734 (West 1998); International Agreement Claims Act, 10 U.S.C.A. § 2734a. See also U.S. DEP'T OF ARMY, REG. 27-20, CLAIMS, ch. 10 (1 Dec. 1997). As one deployed attorney observed during Operation Joint Endeavor, "[the] U.S. has an obligation [under host nation law, and] from both a fiscal and public affairs perspective, to act in an environmentally responsible manner. Environmental damage could result in real estate damages or Foreign Claims Act claims." See Electronic Mail Message, from Major Sharon Riley, to Major Stephen Castlen, subject: Environmental Law in Bosnia (Mar. 1, 1998) *hereinafter* Riley Message] (copy on file with the Center for Law and Military Operations).

182. For example, during Operation Joint Endeavor, the 1st Armored Division legal advisor faced environmental claims. When a spill of approximately 10,000 gallons of JP8 fuel occurred at Lucavac, a coal processing plant, the 1st Armored Division contracted for an assessment and removal of fuel to avoid damage to a shallow groundwater aquifer. The claim was settled with the landowner, and the United States paid damages under the lease agreement. This claim demonstrates the importance of assessing leased property in the host nation in order to defend against future claims for environmental damage. "[E]ven a surface review documenting the condition of the property and snapping some photos could help . . . defend against a variety of types of claims." Riley Message, *supra* note 180. The engineers in Bosnia executed this function and it proved valuable to an effective claims program in the theater of operations. See *id.*



responsible overseas Army command or unified combatant command to determine whether environmental documentation already exists. This documentation could range from prepared EAs or EISs (possibly required under EO 12,114 and DOD *Directive* 6050.7) to information on peculiar host nation laws or applicable arcane international treaties. The legal advisor should also be aware that formal communication with foreign governments concerning environmental agreements and other formal arrangements with foreign governments requires coordination with the Department of State.<sup>183</sup>

The proactive step of contacting other commands prior to the deployment will ensure that the deploying command does not needlessly “reinvent the wheel” and prepare environmental documentation and analysis that is otherwise an electronic mail or facsimile transmission away. In planning for and anticipating environmental issues, a legal advisor should consult with attorneys who have previously deployed to a contingency operation. In this regard, the legal advisor should also review, study, and analyze the environmental lessons learned from prior overseas contingency operations such as Somalia, Haiti, and Bosnia.

#### V. Conclusion—The United States Armed Forces as a Model of Environmental Stewardship During Contingency Operations

Is the United States really serious about the concept of environmental leadership into the 21st century? Is it just lip service to an environmental ethos that is driven by fluctuating standards of environmental compliance based on whether **U.S.** armed forces are located in an impoverished third world nation or located in a wealthier European theater of operations? The failure to apply “environmental justice” in contingency operations may cause the United States armed forces to lose valuable international and coalition support for specific operations.

The nature of security for the United States has dramatically changed since the fall of the Berlin Wall. In this post-cold war era, national security is no longer defined in a purely military dimension. The political, eco-

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183. See AR 200-2, *supra* note 28, para. 8-3(b). Legal advisors must anticipate potential geographic “hot spots” for troop deployments and should communicate with the respective Department of State personnel. As a practical matter, this translates into discussions with the appropriate member of the “country team” or contacting the combatant commander’s staff or the chairman of the Joint Chiefs of Staff to gain access to appropriate Department of State personnel. See JA 422, *supra* note 13, at 5-4.

conomic, and cultural aspects of security have gained prominence. Within that larger context, conditions in many developing world countries spawn complicated problems that ultimately impact the security of the United States. The military is adapting to deal with these new threats through changes in missions, organizations, and training. Recent operations such as Somalia, Haiti, and the current Bosnian operation all reflect the United States military's mission transition from warfare to responding to myriad peace operations across the spectrum of conflict under the close scrutiny of the media's microscope.

Joint Vision 2010 calls for the United States armed forces to achieve full spectrum dominance across a broad and varied range of military operations from warfare to MOOTW.<sup>184</sup> During this decade, environmental issues have become a significant factor in United States foreign policy and will continue to play a significant role. For example, the nature of environmental problems increasingly involves cross-border transboundary impacts, which are emerging as new constraints on the DOD during overseas contingency operations. The President's 1997 national security strategy emphasizes the importance of environmental factors in protecting the nation.<sup>185</sup> To achieve the mandate of this strategy, there is a vast need to educate, to train, and to integrate environmental considerations into the contingency operation package. This mandate, however, lacks the foundation of developed doctrine and guidance in the environmental arena across the spectrum of conflict.

This article analyzed the continuum of recent contingency operations and provided sufficient evidence in theory and in practice that existing doctrine and guidance during MOOTW does not adequately address necessary environmental issues. The conclusions drawn from this analysis reveal an ad hoc, piecemeal approach from operation to operation. This approach lacks a systematic, integrated approach to the goal of environmental stewardship. This article offers some proposed solutions to the legal advisor in the theater of operations and to the military planner and operator in addressing this problem. Implementing these solutions across the full spectrum of operational planning, by involving all members of the

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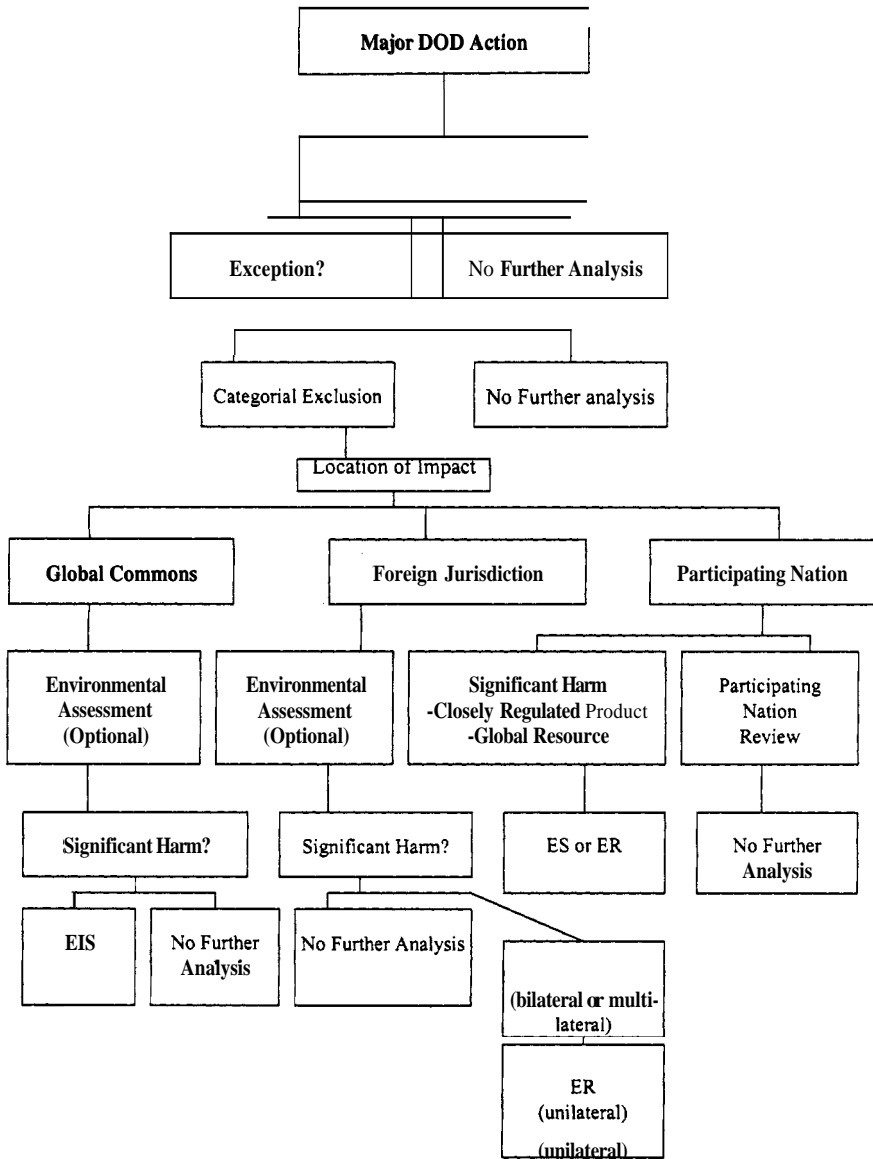
184. See *Concept for Future Joint Operations*, *supra* note 140.

185. See generally NATIONAL SECURITY STRATEGY OF THE UNITED STATES, *supra* note 2.

function staff, will ensure that the United States armed forces serve as a model of environmental stewardship into the 21st century.

## Appendix 1

### Environmental Analysis Required Under EO 12,114



## UNCLASSIFIED

HEADQUARTERS, US COMMAND  
UNIT XXXXX, BOX XXX  
APO AE 09XXX

ANNEX L TO OPLAN (U)  
ENVIRONMENTAL CONSIDERATIONS (U)

(U) REFERENCES:

- a. Executive Order **12,114**, Environmental Effects Abroad of Major Federal Actions, **4 Jan. 79**.
- b. DOD Directive **6050.7**, Environmental Effects Abroad of Major DOD Actions, **31 Mar. 79**.
- c. Joint Pub. **4-04**, Joint Doctrine for Civil Engineering Support, **29 Sept. 95**.
- d. DODI **4715.5**, Management of Environmental Compliance at Overseas Installations, **22 Apr. 96**.
- e. DOD Overseas Environmental Baseline Guidance Document (OEBGD).
- f. Applicable Country-Specific Final Governing Standards (FGS).
- g. AR **200-2**, Environmental Effects of Army Actions, **23 Dec. 88**.
- h. Reserved for Applicable Treaty Law.
- i. Reserved for Applicable International Agreements/Transit Agreements/Status of Forces Agreements.

1. (U) General.

a. (U) Situation.

(1) (U) The combatant commander is ultimately responsible and liable for environmental protection. Troop units must retain a good name, even after the mission is complete. Land forces in the host nation are under the close scrutiny of the civilian population in a campaign where perceptions are often times the most important element. In addition to its forces, U.S. forces bring values that it seeks to impart on all communities. One of these values is respect for the environment and for the people who live in

it. The U.S. forces will be a model of environmental stewardship throughout this operation.

(2) (U) Neither NATO nor HQ, USAREUR can impose procedures or standards on the nations in the logistics or administrative field. However, it is clearly in the interest of all concerned if all nations adopt a common standard of behavior and practice with respect to environmental protection. Site clean-up is a national responsibility. As troop units depart the theater of operations, the conditions of occupied real estate may become a financial issue for units, as well as a public relations issue.

b. (U) Assumptions.

(1) (U) A Joint Task Force (JTF) will be established under a single lead service agent. A dedicated environmental engineer function will be established within the JTF Engineer function.

(2) (U) Environmental analysis will be done in accordance with references a, b, and g. Appendix 1 will be used as a model for this analysis.

(a) (U) The requirements of references a, c, and g may not apply to this operation. The specific determination for a categorical exclusion or exemption from an environmental assessment for the supported operation shall be provided in writing.

(b) (U) If an environmental analysis is required, the lead service agent will ensure that it is prepared in accordance with references a and c, in conjunction with the JTF Commander and his functional staff, and in conjunction with all other combatant command planning activities. If the environmental analysis at Appendix 1 applies, any mitigating actions and other environmental requirements must be included in writing.

(3) (U) The JTF Environmental Engineer, lead service agent, JTF Surgeon, and Preventive Medicine will be involved to the maximum extent possible in the planning for siting of U.S. forces, to include participation on pre-deployment site visits, in locating and evaluating suitable water sources, and in the siting decision of quarters, industrial facilities, work centers, and waste handling facilities. Prior to deployment, information

will be obtained on applicable host nation environmental laws and regulations.

(4) (U) Authority to transit hazardous wastes will be negotiated prior to the deployment of U.S. forces. Status of Forces Agreements (SOFAs) or Transit Agreements will specifically provide for the movement of U.S. generated hazardous waste as a result of participation in the operation using JTF, LOGCAP contractors, host nation contractors, or other transportation assets necessary to affect timely disposal in an environmentally sound manner.

(5) (U) If operationally possible, the Defense Logistics Agency (DLA) will establish support within or near the AO to perform proper disposition of hazardous waste, subject to appropriate and applicable force protection and/or security concerns. All U.S.-generated hazardous waste will be disposed of through the support provided by the DLA. If DLA support is not possible, the unit generating the waste will be responsible for managing the waste in accordance with this OPLAN and the guidance provided by the JTF Environmental Engineer, Surgeon, and Preventive Medicine.

(6) (U) All excess hazardous materials will be returned to home station as hazardous material, unless directed otherwise by the JTF Environmental Engineer.

(7) (U) U.S. forces are responsible only for environmental damage caused by their units. Units are responsible for repair, cleanup, and all related expenses associated with environmental remediation efforts. This should be their most important incentive to plan ahead and to take the right precautions prior to and during their occupation of a site and prior to their eventual redeployment from that site. Efforts must be made to document environmental conditions upon entering and exiting the AO through written description and by photographs.

(8) (U) Some claims resulting from environmental damage by U.S. forces will be valid and require compensation. If individual units, however, respond to environmental claims in an arbitrary manner that is inconsistent with the general policies of other nations, this could lead to an increased number (and monetary amount) of claims within the AO. Disputed claims will be forwarded to designated claims commissions for further action. Unless all nations adopt a common approach to handling



environmental claims, some nations may form the impression that they are suffering inequitable financial costs for their participation in the operation.

c. (U) Limiting Factors.

(1) (U) Existing security conditions, preparation time (e.g., for transit and/or international agreements/SOFAs, supporting environmental contracts), and access by environmental personnel during the initial stage of deployment are limiting factors.

(2) (U) Operational imperatives, including force protection and the non-availability of required logistical support, may limit the ability of deployed forces to comply with the environmental protection requirements reflected herein during the course of the deployment.

(3) (U) After redeployment of units, there may be environmental actions or projects (e.g., on-site treatment of POL-contaminated soils) that are required after transfer of U.S. facilities (sites and base camps).

2. (U) Mission. To provide guidance to protect the health and welfare of U.S. personnel, to minimize adverse environmental impacts during the conduct of operations resulting from implementation of this plan, and to provide an analysis of the impact of the execution of this plan on the environment,

3. (U) Execution.

a. (U) Concept of Operations. This Annex describes in broad terms the conduct of JTF forces during the operation. In every case, however,

obligations are subject to existing conditions, force protection, and mission accomplishment.

(1) (U) General Operating Concepts.

(a) (U) The best practical and feasible environmental engineering practices for the protection of human health and welfare and the environment shall be applied.

(b) (U) U.S. forces will comply with treaty obligations and respect for the sovereignty of other nations.

(c) (U) Measures will be taken to prevent pollution and to minimize adverse environmental impacts during all aspects of the operations.

(d) (U) U.S. forces will take appropriate actions to ensure that wastes generated during the operation are managed in an environmentally sound manner.

(e) (U) Failure to include environmental considerations in all aspects of the operations may expose U.S. forces to unnecessary health risks, cause unnecessary harm to the environment, and subject the United States to unfavorable publicity and future claims for damages.

(2) (U) Preparation and Initial Deployment.

(a) (U) Unit Environmental Coordinators. Deploying forces shall appoint an officer or senior NCO to coordinate and to control unit level environmental procedures. A summary list of appointments shall be provided to the JTF Environmental Engineer upon deployment to the AO.

(b) (U) Pre-Deployment Training. Units shall provide training to ensure familiarity with this Annex, supporting environmental annexes, unit level plans, and environmental procedures.

(c) (U) Manuals. Forces shall deploy with appropriate environmental reference manuals, SOPs, and unit spill response plans. Unit coordinators will contact the J-3 and the JTF Environmental Engineer for additional references specially designed for the operation.

(d) (U) Containers. Forces shall deploy with sufficient quantity and proper, compatible type of hazardous waste disposal containers and over-

packs for use during initial phases of the deployment. Units will plan for resupply of spill containment and cleanup materials sufficient to sustain them for the duration of the operation.

(3) (U) Operations. Operations shall be conducted in a manner that exhibits a model of environmental stewardship. For operations occurring in countries where FGS (Reference f) have been developed, environmental standards will be established in consultation with the respective DOD EEA. In countries where no FGSs have been established, the OEBGD (Reference e) may be used as a source for additional environmental standards, as deemed appropriate by the lead service agent, in coordination with the JTF Commander and his functional staff. U.S. forces shall, at a minimum, comply with the environmental standards and mitigating measures listed below.

(a) (U) Documentation of Initial Environmental Conditions. As soon as practicable after a facility is identified for occupancy by U.S. forces, the JTF Commander will ensure that the initial environmental condition is documented using in-house or contracted environmental professionals. Documentation (e.g., an environmental baseline survey) should describe the condition of water sources, soil, natural resources, cultural and historical properties, air quality, environmental contamination, and other environmental conditions.

(b) (U) Potable Water. Potable water sources will be provided by JTF Logistics and Engineering personnel. Certification of these sources will be accomplished by JTF Preventive Medicine personnel.

(c) (U) Gray Water. Mess, bath, and laundry operations will use existing sewage lines where available or constructed soakage pits and

ponds. Location of soakage pits will be coordinated with Preventive Medicine personnel.

(d) (U) Wastewater/Human Waste (Sanitary Sewage). Sanitary sewage will be disposed of using the method most protective of human health and the environment under existing operational conditions.

(e) (U) Solid Waste. Solid waste will be managed using the method most protective of human health and the environment under existing operational conditions.

(f) (U) Infectious Waste. Infectious waste will be segregated at the point of origin. Mixtures of solid waste and infectious waste will be minimized and will be handled as infectious waste.

(g) (U) Hazardous Materials. Effort should be made to minimize the use and storage of hazardous materials. Such effort will result in the reduction of hazardous waste produced. All excess U.S. hazardous material should be reissued by the supply support activity in theater, if possible. Excess hazardous material not reissued shall be returned to home station as hazardous material, unless impractical. Hazardous materials that cannot be returned to home station shall be disposed of as a hazardous waste.

(h) (U) Hazardous Wastes. The principle of minimizing the use of hazardous materials will be used whenever possible in an effort to minimize the production of hazardous wastes. The DLA, if possible, will establish support within or near the AOR to perform proper disposition of hazardous waste, subject to appropriate and applicable force protection and/or security concerns. All U.S. generated hazardous waste shall be disposed of through the support provided by the DLA. The DLA will develop and distribute guidance on turn-in procedures for hazardous waste. If the DLA is not available, the generator of the hazardous waste shall be responsible for managing the waste in accordance with guidance provided by the J-3 and the JTF Environmental Engineer.

(i) (U) Air Quality. Equipment and facilities will be operated such that adverse health and environmental impacts are minimized. The quality of ambient air will be considered in siting U.S. forces. Problems arising

from air quality will be raised to the J-3, Surgeon, and the JTF Environmental Engineer.

(j) (U) Petroleum, Oil, and Lubricants (POL). POL facilities must be designed and installed with attention to leak detection, prevention, and spill containment requirements, as threat conditions allow. Spill response and cleanup is a unit responsibility. Waste POL shall be disposed of in accordance with alternatives identified for hazardous wastes.

(k) (U) Spill Prevention and Control. Each camp will develop a spill prevention/control plan. Special care will be taken to protect surface waters and groundwater aquifers from contamination. Units will identify and train spill response teams. Units will use drip pans and ensure that adequate types and quantities of containment and cleanup equipment (e.g., dry sweep) are available at hazardous material storage locations and on all transportation assets.

(l) (U) Natural Resources. The J-2 and the JTF Environmental Engineer will pursue available documentation and intelligence assets to identify environmentally sensitive areas. The J-5 will serve as the liaison with host nation environmental authorities and local experts, in consultation with the EEA, during the planning for the construction and/or leasing of major base camps or sites to be occupied by U.S. forces. The JTF Commander will develop appropriate guidance and practices to minimize unnecessary clearing, soil erosion, degradation of air and water quality, and habitat destruction to protect identified environmentally sensitive areas.

(m) (U) Historic and Cultural Resources. The J-2 and the JTF Environmental Engineer will pursue available documentation and intelligence assets to identify historic and cultural areas. To the extent practicable, and consistent with operational conditions, commanders will consider protection of historic and cultural resources and avoid or minimize adverse impacts. The J-5 will serve as the liaison with host nation environmental authorities and local experts, in consultation with the EEA, during the planning for and construction of major base camps or sites to be occupied by U.S. forces. The JTF Commander will develop appropriate guidance and practices to minimize disturbance to historically and culturally significant areas.

(n) (U) Flora and Fauna Protection. Destruction of flora and fauna for clearing fields of fire; for basing needs; and for health, welfare, and

safety is permitted to the minimum extent necessary for these purposes. The destruction and/or clearing of large areas, as well as methods employed for such clearing operations, must be approved and coordinated through operational and engineer channels.

(o) (U) Environmental Evaluations. Unit level officers or senior NCOs will conduct regular evaluations of activities that pose a potential for environmental problems (e.g., motorpools, hazardous waste storage areas, and vehicle maintenance areas).

(p) (U) Incident Reporting. Any significant environmental incident or accident shall be reported in accordance with the Administration and Logistics section of this Annex.

**(4) (U) Exit/Redeployment.**

(a) (U) Hazardous Wastes/Materials. The DLA will establish on-site support within or near the AO to perform proper disposition of hazardous waste, subject to appropriate force protection and/or security concerns.

(b) (U) POL. Cleanup or document POL spills. Empty POL tanks at fuel point and maintenance areas. Pump out excess POL product from sumps and oil/water separators. Waste POL and contaminated solids shall be disposed of in accordance with alternatives identified above for hazardous wastes.

(c) (U) Camp Closure Plan. The appropriate base operations commander will develop a closure plan. The plan will include, at a minimum, acceptable procedures for the turn-in and accountability of hazardous waste and excess hazardous materials; the cleanup or documentation of POL spills; the emptying of POL tanks and separators; and turn-in of waste POL.

(d) (U) Site Remediation. U.S. forces will take prompt action to remediate known imminent and substantial endangerment to deployed forces. Site remediation shall address fuel and lubricant storage and dispensing; ammunition and explosive storage; vehicle parking and maintenance areas; wastes; hazardous material storage; medical storage or disposal; human waste problems; closure of grease or soakage pits; and

stagnant or standing water removal. If possible, provide photographic documentation of all remediation measures.

(e) (U) Documentation of Final Environmental Conditions. As close as practicable to the redeployment of U.S. forces from a site, the JTF Commander will ensure that the final environmental condition is documented. For consistency, the in-house or contracted environmental professionals who conducted the initial environmental conditions report should be used, if possible. The reports on final environmental condition will serve as documentation in the event of claims or other legal challenges.

b. (U) Tasks/Responsibilities.

(1) Lead Service Agent. A single service agent will be designated as the lead for all U.S. environmental policy. The agent will be involved in planning of U.S. forces siting to include participation on predeployment site visits and review of leases and will ensure the preparation of any required analysis in accordance with references a and b.

(2) JTF Commander. Overall responsibility for implementation and compliance with this Annex and with policies, standards, and procedures established by the lead service agent. Will ensure that the initial and final environmental conditions of U.S. facilities are documented and that detailed guidance is developed for the closure of these same facilities. The JTF Commander is responsible for the delegation of appropriate authority and duties to the functional staff to ensure successful implementation of and compliance with Annex L.

(3) J-3 (Operations). Primarily responsible for orchestrating the environmental contingency plan. Prepare recommendations for adjusting plans to prevent the destruction of critical environmental resources in specific geographic areas. Prepare recommendations as to the probability and significance of damaging natural and cultural resources.

(4) J-2 (Intelligence). Coordinates with the J-5, the JTF Engineer, the JTF Environmental Engineer, and the Preventive Medicine section to identify critical environmental vulnerabilities of the area and the population. Includes environmental vulnerabilities in the Intelligence Preparation of the Battlefield (IPB) process to prevent costly environmental claims.

(5) J-4 (Logistics). Monitors the use of hazardous materials. Responsible for all aspects of hazardous materials management to include

minimizing use, storage, transportation, disposition, and return to home station of excess materials. Plans for the appropriate disposal of solid and hazardous waste. Ensures that spill plans for extended operations are prepared as appropriate. In conjunction with the JTF Engineer, will provide potable water sources.

(6) J-1 (Personnel). Coordinates with the J-3 and the Public Affairs Officer for educating all military personnel concerning individual environmental responsibilities. Ensures the necessary level of environmental expertise is assigned to the command.

(7) J-5 (Civil Affairs Officer). With the assistance of host nation civil authorities, determines the location of critical environmental resources, assets, and facilities to prevent environmental degradation and to ensure proper disposal of solid and hazardous wastes. Recommends to the commander those resources that should be afforded special considerations for protection because of value to the mission, public health concerns, danger of regional or global contamination, environmental claims, post-conflict clean-up costs, or economic viability of the area.

(8) JTF SJA. Researches and pinpoints the legal requirements for environmental actions in the theater to include treaties, international agreements, and host nation laws. Advises the commander in advance of deployment of the peculiar aspects of environmental compliance during MOOTW in the host nation. Responsible for coordinating legal issues with SJAs senior in the chain of command.

(9) JTF Engineer. Responsible to the JTF Commander for the operational support of Annex L and staffing of an environmental office that will be responsive to the JTF Commander. In coordination with the lead service agent and the JTF SJA, and in consultation with the EEA, will establish a plan for coordinating with the host nation, other foreign nations, non-governmental organizations (NGOs), and other activities on applicable environmental matters. Provides technical advice to the commander and staff, in conjunction with the JTF J-4, on issues of public health effects of planned courses of action, water and wastewater treatment, and potable water sources. Will develop appropriate guidance and practices to minimize unnecessary clearing, soil erosion, degradation of air and water quality, and unnecessary disturbance to historic and culturally significant areas. Ensures detailed guidance is developed for the closure of U.S. facilities. Will identify those site conditions or existing legal or real estate agreements that define environmental actions or projects that must continue



after transfer of the site and will initiate appropriate action to complete the cleanups.

(10) JTF Environmental Engineer. Proponent for the environmental section of Annex L and heads the environmental office. Responsible for developing more detailed environmental services guidance and standards incorporating references b, c, d, e, and f, as appropriate, in coordination with the lead service agent. Responsible for coordinating with the JTF Surgeon, the JTF Safety Officer, and the JTF SJA, as appropriate. Pursues available documentation and, in coordination with the J-2, uses intelligence assets to identify environmentally sensitive areas. Responsible for consulting with the respective EEA on applicable host nation country-specific issues. Coordinates, where practicable, spill response plans with civilian fire departments and other host nation authorities. Develops detailed camp closure guidance in regards to the responsibilities of unit commanders, base camp commanders, and support contractors. Retains copies of initial and final environmental condition reports.

(11) JTF Surgeon. Responsible for medical (e.g., preventive medicine) support to Annex L. Provides commander and the staff with technical advice concerning host nation population and military personnel health issues. Provides advice on the health implications of water and wastewater treatment, hazardous and solid waste disposal, air quality, health risk assessments, vector control to protect human health and welfare, and medical waste treatment and disposal.

(12) Preventive Medicine Personnel. Participate in planning for siting of U.S. forces, perform or oversee sampling, analysis, and monitoring to protect health and safety of deployed personnel and the surrounding community. Conduct periodic environmental health **risk** assessments of activities that pose potential environmental or health problems. Report any significant findings to the unit commander and unit level environmental point of contact. Report any findings that cannot be corrected immediately to the JTF Environmental Engineer and the JTF Surgeon.

(13) JTF Safety Officer. Responsible for safety matters in support of Annex L. Coordinates activities with the JTF Environmental Engineer, the JTF Surgeon, and the lead service agent, as appropriate.

(14) Environmental Executive Agents (EEAs). Responsible for providing agreed-upon support to the JTF Engineer and the Environmental Engineer on environmental matters within host nations for which FGS

have been established, especially as it relates to consultations with host-nation authorities during predeployment planning, the initial stages of deployment, and redeployment.

4. (U) Administration and Logistics.

a. (U) General Incident Reporting Requirements. Any significant environmental incidents or accidents shall be reported in accordance with specific incident reporting instructions developed by the JTF Environmental Engineer. The JTF Environmental Engineer, the JTF Commander, the JTF Surgeon, the lead service agent, and the EEA shall be notified within 24 hours of major incidents; accidents; and spills of hazardous materials, wastes, and POL. Records of spills, discovery of contaminated sites, etc., will be maintained for later use in documenting final environmental conditions of the AO.

b. (U) Environmental Reports. Copies of initial and final environmental conditions reports and final camp closure plan for a facility occupied by U.S. forces shall be provided through engineer channels to the JTF Environmental Engineer, the real estate office, and the EEA.

c. (U) Records Retention. Initial and final environmental condition reports, camp closure plans, records and documents deemed important for later use in resolving potential environmental claims against the U.S. government, and other records and documents required to establish "lessons learned" shall be archived by the lead service agent for 3 years following the operation, or as determined by the Single Service Claims Responsibility. As soon as practical after completion of the operation, the lead service agent will forward a list of archived records and documents to the appro-

priate real estate and claims offices, the combatant command, and the EEA.

General

Commanding

Appendices:

1. Environmental Analyses/Assessments (Exemptions/Categorical Exclusions)
2. Environmental Out-Processing Checklist
3. Environmental Out-Processing Report
4. Notification — Hazardous Waste Shipment
5. Environmental Reporting
6. Environmental Request for Support
7. Determination of the Amount Spilled & Treatment Standards

## PRESIDENTIAL WAR POWER: DO THE COURTS OFFER ANY ANSWERS?

MAJOR GEOFFREY S. CORN<sup>1</sup>

Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed . . . is a responsibility of this Court as ultimate interpreter of the Constitution.

— *Baker v. Carr*<sup>2</sup>

Few government decisions have greater impact on the military than ordering combat operations. A force that is loyal to the Constitution, which empowers the government to make such decisions, is justifiably proud of an untarnished history of obedience to the war power decisions of the civilian government. Interpretations of the constitutional process for making such decisions, however, have varied throughout U.S. history.<sup>3</sup> This article surveys the impact of federal cases on this interpretation. The judicial decisions that either directly or by implication relate to the issue of the constitutional distribution of war powers provide the framework for

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2. 369 U.S. 186, 211 (1962).

3. This issue has also been the subject of intense scholarly debate. See, e.g., Robert F. Turner, *War and the Forgotten Executive Power Clause & the Constitution: A Review Essay & John Hart Ely's War and Responsibility*, 34 VA. J. INT'L L. 903 (1994).

analyzing war power controversies and determining the sources and limits of presidential authority to order combat operations.

This framework supports a broad view of executive war power. With the exception of responding to emergencies, however, it is congressional support for war power policies, not the unilateral constitutional power of the President that forms the foundation for this view. While this framework indicates that congressional support for the President is often the *sine quo non* for a constitutionally valid decision to take the nation to war, judicial decisions also indicate that implied congressional support is constitutionally sufficient. At the other end of the spectrum, these decisions also consistently suggest that explicit congressional non-support marks the outer limits of this broad presidential authority.

The cases analyzed in this article demonstrate three critical points. First, war power issues are justiciable. Second, the federal courts have never concluded that the executive is vested with unilateral constitutional authority to commit United States armed forces to combat. Third, under the right circumstances a war power controversy between the President and Congress may necessitate judicial resolution.<sup>4</sup> While many of the cases that are analyzed herein date from early periods of the nation's history, they form the common foundation for virtually all of the cases decided on this issue in recent history.

A preliminary issue that must be addressed is whether there is value in providing legal analysis for what many regard as an inherently political topic. The answer to this is two-fold. First, issues regarding war powers cannot be absolutely categorized as non-justiciable. As this article illustrates, the fluctuating nature of the doctrines of political question and equitable discretion preclude such a conclusion. Second, even when these issues are resolved on a purely political level, the parties to the negotiations rely on the law. Therefore, a knowledge and understanding of this body of law, and the analysis the courts used when faced with such issues, is essential to a thorough understanding of the arguments asserted by both parties to any future political debate surrounding the use of force.

Part I of this article provides the background justifying resort to judicial decisions to analyze this issue. Part II considers whether such an issue could be justiciable. Part III proposes an analytical framework provided by the courts to resolve a separation of powers issue. Parts IV, V, VI, and

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4. See *infra* notes 22-67 and accompanying text.

VII review war related decisions from different periods of our nation's history. Parts VIII and IX analyze how these decisions, and the history of war making decisions they represent, factor into the analysis based on the template provided in Part III. This article concludes by applying the template to the history of warmaking decisions. This supports a broad, but not unilateral view of presidential war power.

## I. Background

With only the United States Constitution as a guide to determine which branch of the United States government possessed predominant authority over war power decisions, Congress would logically prevail. While Article II designates the President as the commander in chief of the armed forces,<sup>5</sup> Article I explicitly vests Congress with extensive war-related powers.<sup>6</sup> Proponents of limited presidential war power assert that the vesting of extensive war-related powers in the legislative branch was no accident. Instead, it was a deliberate attempt on the part of the framers of the Constitution to ensure that the nation went to war only after the judgment of the most representative branch of the government determined that such action was appropriate. According to one such proponent:

[T]he question is whether the grant to Congress of the power to declare war alters or affirms the basic principle of separation of powers . . . it plainly affirms that principle . . . . The power to declare war, when coupled with other authorities vested on Congress and when viewed as a component of basic constitutional structure, makes it clear that the authority of Congress in this regard covers a broad spectrum, from the creation and regulation of the armed forces through any decision to embark upon sustained hostilities. This is not to suggest the congressional authority arises only at the endpoints of the spectrum. Rather, consistent with the separation of powers principle, the authority of Congress encompasses both the endpoints and the vast territory in between.'

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5. U.S. CONST. art. II, § 2.

6. *Id.* art. I, § 8. These powers include the power of the purse, the power to provide for the establishment and regulation of land and naval forces, and the power to declare war and grant letters of *marque and reprisal*. *Id.*

7. Allan Ides, *Congress, Constitutional Responsibility and the WarPower*, 17 *LOY. L.A. L. REV.* 599,611 (1984).

Under such a view, the role of the commander in chief is to execute a conflict once Congress decides to go to war.<sup>8</sup> The record of the debate surrounding war powers at the Constitutional Convention is often cited in support of this conclusion.<sup>9</sup>

Analysis of war making authority, however, only begins with the constitutional text. History illustrates a steadily increasing assertion of presidential war power. This trend is characterized as follows:

Despite the clear framework of congressional predominance ordained by the Constitution, primary authority over the war power has shifted from that representative body to the executive branch. The transfer of authority was not abrupt, but instead occurred through a lengthy process of evolution that picked up pace as the United States emerged in the twentieth century as a recognized world power. The shift was not inevitable; that it has taken place is, however, **undeniable**.<sup>10</sup>

The significance of the history of war power decision-making has been asserted to support both expansive<sup>11</sup> and restrictive theories of presidential war power.<sup>12</sup> Regardless of the textual analysis leading to the conclusion,<sup>13</sup> however, the proposition that during the course of history there

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8. This position is expressed by Allan Ides as follows:

The purpose of vesting this authority in the President was primarily to avoid some of the pitfalls that had arisen during the Revolutionary War when . . . Congress as a deliberative body had proven itself to be an entirely unsatisfactory vehicle for the day-to-day prosecution of war . . . [T]his power to direct the war effort did not, however, vest the President with the constitutional authority to override the more pervasive authorities of Congress . . . [T]hus, the Commander-in-Chief's authority, although created by the Constitution, derives its power from congressional will. Without Congress, the President would have neither the forces with which to operate nor, assuming forces had been supplied, the authorization to use those forces.

*Id.* at 611-12.

9. *Id.* at 612-14. See also JOHN H. ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* (1993).

10. Ides, *supra* note 7, at 616.

11. *Id.*

has been a shift in predominant authority in this area to the President is well accepted.<sup>14</sup>

It is against this constitutional separation of powers backdrop that the armed forces of the United States operate today. The only combat operation since the Vietnam War that was expressly authorized by Congress was "Operation Desert Storm" in 1991.<sup>15</sup> There is no evidence that the military ever questioned the legality of the numerous other operations that were conducted during this period, and, fortunately, most of these operations were unaffected by war power debate.<sup>16</sup> However, a serious future disagreement between the President and Congress regarding a war power decision could conceivably require military leaders to make very difficult decisions. If Congress were to vote against authorizing a future operation, could the President legally order execution? If the execution order was issued, must it be obeyed? If it were obeyed, could the military leaders who executed the order be subject to any adverse consequences? Finally, is there any role for the judicial branch in the event of such an impasse between the two political branches? This article provides an analytical framework for answering such questions by identifying whether the limits of presidential authority to issue constitutionally valid orders to use force

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12. See generally *id.*; Robert F. Turner, *The War Powers Resolution: Unconstitutional, Unnecessary, and Unhelpful*, 17 LOU. L.A. L. REV. 683 (1984); Michael Ratner & David Cole, *The Force of Law: Judicial Enforcement of the War Powers Resolution*, 17 LOU. L.A. L. REV. 715 (1984); Clement J. Zablocki, *War Powers Resolution: Its Past Record and Future Promise*, 17 LOY. L.A. L. REV. 579 (1984); Michael J. Glennon, *Too Far Apart: Repeal the War Powers Resolution*, 50 U. MIAMI L. REV. 17 (1995); Brian M. Spaid, *Collective Security v. Constitutional Sovereignty: Can the President Commit U.S. Troops Under the Sanction of the United Nations Security Council Without Congressional Approval?*, 17 U. DAYTON L. REV. 1055 (1992); John W. Rolph, *The Decline and Fall of the War Powers Resolution: Waging War Under the Constitution After Desert Storm*, 40 NAVAL L. REV. 85 (1992); Christopher A. Ford, *War Powers As We Live Them: Congressional-Executive Bargaining Under the Shadow of the War Powers Resolution*, 11 J.L. & POL. 609 (1995); Bennett C. Rushkoff, *A Defense of the War Powers Resolution*, 93 YALE L.J. 1330 (1984); ELY, *supra* note 9.

13. See Turner, *supra* note 3 (providing an excellent discussion of the weaknesses of this view).

14. See *supra* note 10 and accompanying text.

15. Combat operations initiated pursuant to the orders of the President and absent express Congressional authorization include the Mayaguez rescue mission, the Iranian hostage rescue mission, the deployment of U.S. Marines to Lebanon, Operation Urgent Fury, Operation Just Cause, Operation Joint Endeavor, Operation Provide Hope, and Operation Provide Comfort.



can be derived from an analysis of judicial decisions that relate to both war power and separation of powers issues.<sup>17</sup>

Resolving such an issue from judicial authority holds special significance for U.S. military officers. There is no question that there exists an abundance of scholarly analysis of this issue, with advocates for both broad and narrow interpretations of presidential war power. While the importance of such works should not be underestimated, especially in the impact they have on policy development, they do not amount to conclusive enunciations on the subject. In contrast, judicial interpretations of the Constitution, pursuant to the precedent of *Marbury v. Madison*,<sup>18</sup> are ostensibly conclusive. There is no reason to believe that this precedent of judicial authority to interpret the Constitution should not apply to a war power controversy. It is impossible to predict exactly how the political branches (or, for that matter, the military) would respond to a judicial resolution of such an issue. It is fair to presume, however, that such a resolution would be given the respect traditionally accorded such decisions under the U.S. system of government. In fact, when the Supreme Court indicated "that it is an 'inadmissible suggestion' that action might be taken in disregard of a judicial determination"<sup>19</sup> it demonstrates that the Court expects

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16. One example of an operation that was ostensibly influenced by such debate is the United States participation in Lebanon during 1983. The controversy surrounding this operation led to a debate in Congress as to whether the President was required to comply with the War Powers Resolution. See War Powers Resolution, Pub. L. No. 93-248, 87 Stat. 555 (1973) (codified at 50 U.S.C.A. §§ 1541-1548 (West 1998)). The final result was a specific authorization for continuation of the operation with a specific end date that had been negotiated with the administration. See Ratner & Cole, *supra* note 12, at 745-49.

Another example, albeit less direct, of political debate surrounding war power authority that impacted on an ongoing military operation was the United States involvement in Operation Provide Hope in Somalia. Although erosion in public support was the prime motivation behind the United States pullout from the operation, Congress scrutinized the President's authority to continue an operation that he had unilaterally initiated. The impact of this is less certain than the response to Lebanon. While the Senate passed a joint resolution to support the operation, the resolution languished in the House of Representatives. The President mooted the issue by withdrawing all U.S. forces from the operation. See Sean D. Murphy, *Nation Building: A Look At Somalia*, 3 TUL. J. INT'L. & COMP. L. 19, 39-40 (1995).

17. The constitutional importance of the congressional responses to these operations may be more significant than the impact they had on the respective operations. It appears that the congressional assertion of authority over the decision to continue these operations increased proportionally to the erosion of public support for them. This is an indication that, while Congress may be content to provide support to certain operations by implication, it continues to reserve the power to reject affirmatively war power policy that is initiated by the President. See *infra* notes 313-332 and accompanying text.

18. 5 U.S. (1 Cranch) 137 (1803).

nothing less than full compliance with judicial decisions, even if those decisions relate to a conflict of positions between different branches of the government.

Many scholarly works on this subject dismiss the role of the judiciary in resolving these issues and instead analyze the purported meaning of the Constitution and the debates surrounding its founding. However, members of a profession whose allegiance is owed to the Constitution must give ultimate respect not to academic views, but to interpretations of the Constitution provided by the branch of government that has the duty "to say what the law is."<sup>20</sup> Furthermore, scholarly works that propose contradictory conclusions tend to "yield no net result but only suppl[y] more or less apt quotations from respected sources on each side of any question."<sup>21</sup>

Those who swear to uphold the Constitution cannot ignore judicial decisions that bear on this issue. It is for this reason that this article approaches the issue of determining the constitutional limits of presidential war power from a somewhat unconventional approach—the judicial perspective. The relevance of this perspective, however, is contingent on the conclusion that under the right circumstances a war power controversy could be justiciable.

## 11. Justiciability

If a constitutional crisis concerning war power developed between the President and the Congress, the judiciary might conceivably be called upon to resolve the crisis. Because military officers swear oaths of allegiance to the Constitution, any such resolution would ostensibly be binding on them.<sup>22</sup> What is far less certain is the position that the judiciary, and

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19. *Powell v. McCormack*, 395 U.S. 486, 549 n.86 (1969) (quoting *McPherson v. Blacker*, 146 U.S. 1, 24 (1892)) (emphasis added).

20. *Marbury*, 5 U.S. (1 Cranch) at 177.

21. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-35 (1952) (Jackson, J., concurring).

22. See *Powell*, 395 U.S. at 549 n.86. This conclusion is based not only on *Powell v. McCormack*, but also on the text of the oath of a military officer. The oath makes clear that military officers (who will in turn be commanders) swear an oath to support and to defend the Constitution of the United States, and there is no allegiance sworn to either the President or the Congress. It is the judiciary whose historical role has been to interpret the meaning of that Constitution. See, e.g., *Marbury*, 5 U.S. (1 Cranch) at 177; *Baker v. Carr*, 369 U.S. 186, 211 (1962). Therefore, loyalty to the Constitution would seem to require acceptance of judicial interpretation of the Constitution.

the United States Supreme Court in particular, would take regarding the justiciability of such an issue.<sup>23</sup> While the Supreme Court did adjudicate such issues early in the nation's history,<sup>24</sup> these decisions pre-date modern doctrines of judicial restraint.<sup>25</sup>

These doctrines of judicial restraint, the most relevant of which is the political question doctrine, should not, however, be viewed as conclusively precluding judicial intervention to resolve such issues. In fact, there are examples of relatively contemporary judicial willingness to adjudicate issues involving war powers.<sup>26</sup> A close analysis of the doctrine of judicial restraint supports the reasonableness of the conclusion that war power issues are potentially justiciable.

The leading case in the area of judicial restraint is *Baker v. Carr*.<sup>27</sup> In this case, the Supreme Court established the test for determining when an issue that is presented to the judiciary is so inherently political that it is non-justiciable.<sup>28</sup> Justice Brennan's opinion in *Baker* lists a variety of circumstances under which an issue would qualify as a "political question."

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial desecration; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment

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23. See Ratner & Cole, *supra* note 12, at 733-34.

24. See *infra* notes 105-141 and accompanying text (discussing these early Supreme Court decisions).

25. These include the political question doctrine and the doctrine of equitable discretion. See *infra* notes 27-29, 51 and accompanying text.

26. See, e.g., *Dacosta v. Laird*, 471 F.2d 1146 (2d Cir. 1973); *Berk v. Laird*, 429 F.2d 302 (2d Cir. 1970); *Dellums v. Bush*, 752 F. Supp. 1141 (D.D.C. 1990).

27. 369 U.S. 186 (1962).

28. See *id.* Such an issue is therefore properly left to the political branches of government for resolution. See STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 140-42 (1990).

from multifarious pronouncements by various departments on one question.<sup>29</sup>

While many of these circumstances seem to suggest the non-justiciability of a war power issue, this conclusion is undermined by analysis of the precise nature of such an issue. Such an issue presupposes a conflict between the President and the Congress over a proposed combat deployment. This would represent a political loggerhead that would require judicial resolution only as a last resort.<sup>30</sup> Resolution of this loggerhead would require constitutional interpretation, the classic function of the federal judiciary.<sup>31</sup> So framed, the question of which branch of the federal government has the constitutional "final say" on the decision to go to war seems the antithesis of the "textually demonstrable constitutional commitment of the issue to a coordinate political department."<sup>32</sup>

Under constitutional jurisprudence, it is this absence of a textually demonstrable commitment of power that makes judicial resolution of such an issue so essential. Pursuant to Supreme Court precedent, this judicial function is not automatically nullified because such an issue touches on foreign affairs.<sup>33</sup> In fact, even in *Baker*, the Court specifically instructed

29. *Baker*, 369 U.S. at 217.

30. See, e.g., *Dellums*, 752 F. Supp. at 1141.

31. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (holding that it is "emphatically the province and the duty of the judicial department to say what the law is").

32. *Baker*, 369 U.S. at 217. In *Powell v. McCormack*, the Supreme Court seemed to limit the significance of the concerns that judicial resolution of a controversy involving the political branches would cause embarrassment or show a lack of respect for a coordinate branch. See *Powell v. McCormack*, 395 U.S. 486 (1968). The Court subjugated these concerns to the traditional judicial responsibility of interpreting the Constitution. See *id.* See also *infra* note 33. Furthermore, the language used by the Court in *Baker* suggests that the enunciated criteria for making a political question determination must be considered in a very discriminating way in light of all of the interests involved in the case. See *Baker*, 369 U.S. at 217. See also *infra* note 33 and accompanying text.

33. See, e.g., *Nixon v. Fitzgerald*, 457 U.S. 731 (1982); *Buckley v. Valeo*, 424 U.S. 1 (1976); *United States v. Nixon*, 418 U.S. 683 (1974). Although *Baker* involved a domestic issue (a reapportionment challenge), Justice Brennan suggested that, while cases touching foreign affairs often may be non-justiciable, such a conclusion should not be automatic. See *Baker*, 369 U.S. at 211-12. Careful analysis of the precise issue is required. *Id.* The Court has also rejected as a per se trigger for the doctrine the potential embarrassment that might result from such a resolution. See *Powell*, 395 U.S. at 548-49 (rejecting the argument that the potential for an embarrassing confrontation between the judicial and legislative branches rendered the case non-justiciable). See also *infra* notes 35-37 and accompanying text.

against assuming that every foreign affairs-related issue amounts to a political question:

It is error to suppose that every case or controversy that touches on foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action.<sup>34</sup>

The potential embarrassing result of such a resolution should not be considered a per se trigger for the doctrine. The Supreme Court made this clear in *Powell v. McCormack*.<sup>35</sup> In that case, the plaintiff was elected to the House of Representatives, but was denied his seat due to allegations of misconduct in his home state.<sup>36</sup> He sought injunctive, mandatory, and declaratory relief against the Speaker of the House and his subordinates. The Supreme Court specifically rejected the argument that the potential for an embarrassing confrontation between the judicial and legislative branches rendered the case non-justiciable.

Respondent's alternate contention is that the case presents a political question because judicial resolution of petitioners' claim would produce a "potentially embarrassing confrontation between coordinate branches" of the Federal Government. But . . . a determination of petitioner Powell's right to sit would require no more than an interpretation of the Constitution. Such a determination falls within the traditional role accorded courts to interpret the law, and does not involve a "lack of respect due [a] coordinate [branch] of government," nor does it involve an "initial policy determination of a kind clearly for non-judicial

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34. *Baker*, 369 U.S. at 211-12. In the last portion of this quotation, Justice Brennan suggests consideration of the possible consequences of judicial action. While instinct may trigger consideration of foreign policy embarrassment or failure as such a consequence of judicial resolution of a war power issue, there are other consequences that a court might consider equally important. These could include not only the precedential consequence of a judicial pronouncement of what branch has war power authority, but also the human consequence involved. In short, a court would have to consider that judicial action could conceivably stop or fail to stop a planned military operation, and the lives of the citizen soldiers of this nation would be impacted by any such decision.

35. 395 U.S. 486 (1968).

36. *Id.* at 486.

discretion.” *Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts’ avoiding their constitutional responsibility.*<sup>37</sup>

The rationale for this rejection seems equally applicable to a war power dispute between the legislative and executive branches. Both *Baker* and *Powell* involved purely domestic issues. While they seem logically applicable to a war power dispute, the significant foreign relations impact of such a dispute must be considered. While *Baker* did address the significance of such an impact, the most significant political question case involving a pure foreign relations issue was *Goldwater v. Carter*.<sup>38</sup> This case involved a challenge by Senator Goldwater to President Carter’s decision to terminate, without the consent of the Senate, a mutual defense treaty with Taiwan.<sup>39</sup> The district court dismissed the challenge for lack of standing, but the circuit court reversed and held that the Constitution authorized the President to withdraw from the treaty in the manner in which he did.<sup>40</sup> The Supreme Court concluded that the issue was non-justiciable, vacated the circuit court decision, and remanded for dismissal.<sup>41</sup> Four of the five Justices who joined in this result concluded that the issue presented a “political question.”<sup>42</sup> This conclusion was based on the fact that the case implicated foreign affairs. According to Justice Rehnquist, who wrote for these four Justices:

I am of the view that the basic question presented by the petitioners in this case is “political” and therefore nonjusticiable because it involves the authority of the President in the conduct of our country’s foreign relations and the extent to which the Senate or the Congress is authorized to negate the action of the President.<sup>43</sup>

Although this conclusion might at first glance seem to apply to a war power dispute, the justifying rationale leaves room to distinguish a war power controversy. First, Justice Rehnquist concluded that the absence of

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37. *Id.* (citing *Baker*, 369 U.S. at 217) (emphasis added).

38. 444 U.S. 996 (1979).

39. *Id.* at 997-98.

40. *Goldwater v. Carter*, 617 F.2d 697 (1979) (en banc), 444 U.S. 996 (1979).

41. *Goldwater*, 444 U.S. at 996.

42. *Id.* at 997-1002.

43. *Id.* at 1002 (Rehnquist, J., concurring in judgment).

any constitutionally established Senate role in treaty abrogation rendered the issue “controlled by political standards.”<sup>44</sup> This same conclusion does not necessarily apply to war power issues, particularly in light of early cases that indicate a congressional role in authorizing both “perfect” and “imperfect” war.<sup>45</sup> Second, the case was distinguished from *Youngstown Sheet & Tube Co. v. Sawyer*<sup>46</sup> because, unlike *Youngstown*, it involved private litigants and because *Youngstown* involved “an action of profound and demonstrable domestic impact.”<sup>47</sup> It is certainly conceivable that a war power challenge could originate with a private litigant. Even assuming that a challenge was initiated by a member of Congress, it is difficult to imagine an action by the President that would have more potential for “profound and demonstrable domestic impact” than the decision to embroil the nation in a war contrary to the express will of Congress. Finally, Justice Rehnquist analogized the case to *United States v. Curtiss-Wright Corp.*<sup>48</sup> because “the effect of this action, as far as we can tell, is ‘entirely external to the United States, and [falls] within the category of foreign affairs.’”<sup>49</sup> While the decision to take the nation to war would naturally result in an external effect and have foreign affairs implications, the effect would certainly not be “entirely” external. Ultimately, the cost of conducting a war, measured in both lives and money, falls on the American people. This should certainly qualify as a substantial domestic impact.

In the *Goldwater* plurality opinion, Justice Powell’s rejected outright the conclusion that the issue was a political question. His rationale is enlightening. Although he concurred in the judgment of the Court, he based his concurrence on a ripeness analysis.<sup>50</sup> In so doing, he advanced what is perhaps the most persuasive theory for concluding that a war power disagreement between the President and Congress is properly within the realm of judicial resolution.

This case “touches” foreign relations, but the question presented to us concerns only the constitutional division of power between Congress and the President . . . .

Interpretation of the Constitution does not imply lack of respect for a coordinate branch. If the President and the Con-

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44. *Id.* at 1003.

45. *See infra* notes 105-113 and accompanying text.

46. 343 U.S. 579 (1952).

47. *Goldwater*, 444 U.S. at 1004.

48. 299 U.S. 304 (1936).

49. *Goldwater*, 444 U.S. at 1005 (quoting *Curtiss-Wright*, 299 U.S. at 315).

50. *Id.* at 999-1001 (Powell, J., concurring).

gress had reached irreconcilable positions, final disposition of the question presented by this case would eliminate, rather than create, multiple constitutional interpretations. The specter of the Federal Government brought to a halt because of the mutual intransigence of the President and Congress would require this Court to provide a resolution pursuant to our duty "to say what the law is."<sup>51</sup>

In his dissenting opinion, Justice Brennan also rejected the "political question" conclusion, but saw no "ripeness" impediment to justiciability. Ironically, this justice, who wrote the opinion in *Baker*,<sup>52</sup> characterized Justice Rehnquist's application of the political question doctrine as follows: "[I]n stating that this case presents a nonjusticiable 'political question,' MR JUSTICE REHNQUIST, in my view, profoundly misapprehends the political-question principle as it applies to matters of foreign relations."<sup>53</sup> Brennan then expressed what he considered the proper understanding of the doctrine.

Properly understood, the political-question doctrine restrains courts from reviewing an exercise of foreign policy judgment by the coordinate political branch to which authority to make that judgment has been "constitutional[ly] commit[ted]." But the doctrine does not pertain when a court is faced with the *antecedent* question whether a particular branch has been constitutionally designated as the repository of political decisionmaking power. The issue of decisionmaking authority must be resolved as a matter of constitutional law, not political discretion; accordingly, it falls within the competence of the courts.<sup>54</sup>

In spite of the "openings" in the analysis used by Justice Rehnquist to reach the political question conclusion, the inclination to avoid involving the Court in foreign affairs issues is undeniable. Ultimately, whether the Court would follow this inclination in a war power dispute would depend on whether the case is characterized by the Court as an issue of "entirely external" impact and therefore one of foreign policy, or one involving "profound and demonstrable domestic impact." Because of the uncertainty surrounding how the Supreme Court would treat such an issue, the lower court treatment of war power issues is especially significant in analyzing the proper characterization of such an issue.

Several warmaking related decisions demonstrate that such cases are not automatically non-justiciable. Perhaps the most significant of these



decisions involved the Vietnam War. Throughout the years of United

51. *Id.* at 999-1001 (Powell, J., concurring) (citing *United States v. Nixon*, 418 U.S. 683, 703 (1974) and quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). Although this was only a concurring opinion, the method it established for analyzing a separation of powers dispute—that is, whether the dispute between the two political branches is sufficiently ripe—has been used by various courts. “[The test for ripeness is helpful] even though Justice Powell spoke only for himself . . . . Four different views were expressed by the various justices. However, several other courts have adopted Justice Powell’s reasoning.” *Dellums v. Bush*, 752 F. Supp. 1141, 1150 n.23 (D.D.C. 1990) (citations omitted). Lower courts have followed this approach in cases that involve war power issues. *See, e.g., Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 210 (D.C. Cir. 1985); *Lowry v. Reagan*, 676 F. Supp. 333, 339 (D.D.C. 1987), *aff’d*, No. 87-5426 (D.C. Cir. Oct. 17, 1988); *Crockett v. Reagan*, 558 F. Supp. 893, 899 (D.D.C. 1982), *aff’d*, 720 F.2d 1355 (D.C. Cir. 1983) (*per curiam*). These cases suggest a distinction between the narrow doctrine of judicial restraint based on “political question” concerns and a much broader and improper application of a theory that any “political issue” is non-justiciable.

One case in particular suggests that the courts will be far more likely to intervene to resolve a fully ripe dispute between the Congress and the President on the issue of war power than they are to issue a ruling that crystallizes such a dispute. In *Crockett v. Reagan*, a federal court was again asked by members of Congress (29) to determine whether the War Powers Resolution was triggered by a relatively minor United States military operation that involved the dispatch of 56 military advisors to El Salvador. 558 F. Supp. 893, *aff’d per curiam*, 720 F.2d 1355 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984). The court concluded “that the fact-finding that would be necessary to determine whether U.S. forces have been introduced into hostilities or imminent hostilities in El Salvador renders this case in its current posture non-justiciable.” *Id.* at 898. The court held that this issue was more appropriate for congressional, not judicial, investigation and determination. *Id.* The court did, however, distinguish two other situations where it suggested that a similar case would be justiciable. First, it indicated that if asked to determine whether a commitment of forces on a scale similar to that in Vietnam triggered the War Powers Resolution, “it would be absurd for [the court] to decline to find that U.S. forces had been introduced into hostilities after 50,000 American lives had been lost.” *Id.* Second, and perhaps more significantly for the proposition that a clear and ripe dispute between the branches would be justiciable, the court stated that:

If Congress doubts or disagrees with the Executive’s determination that U.S. forces in El Salvador have not been introduced into hostilities or imminent hostilities, it has the resources to investigate the matter and assert its wishes . . . . Congress has taken absolutely no action that could be interpreted to have that effect. *Certainly, were Congress to pass a resolution to the effect that a report was required under the [War Powers Resolution], or to the effect that the forces should be withdrawn, and the President disregarded it, a constitutional impasse appropriate for judicial resolution would be presented.*

*Id.* at 899 (citing *Goldwater v. Carter*, 444 U.S. 996 (1979) (Powell, J., concurring)) (emphasis added).

52. 369 U.S. 186 (1962).

States military involvement in Vietnam, federal courts were presented with "a slew of judicial challenges [to the constitutionality of the war] by citizens, taxpayers, members of Congress, and draftees."<sup>55</sup> After several refusals to adjudicate this issue based on the political question doctrine,<sup>56</sup> federal courts refined their analysis to focus on whether there was a textual commitment of war power to a specific political branch, and not to the political branches in general.<sup>57</sup> This refinement led to the conclusion that these issues were justiciable.<sup>58</sup>

The cases that reached the merits of the challenges to the war shared one fundamental proposition. They all presented the justiciable issue of whether a decision by the President to send United States armed forces into a combat environment was constitutionally valid. Since the issue was justiciable, the standards to make the determination of whether the President's action was constitutionally valid fall within the purview of judicial analysis and resolution.<sup>59</sup> Ultimately, however, the cooperation between the

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53. *Goldwater*, 444 U.S. at 1000 (Brennan, J., dissenting).

54. *Id.* (citing *Powell v. McCormack*, 395 U.S. 486, 519-21 (1969)).

55. *Ratner & Cole*, *supra* note 12, at 727. *See, e.g.*, *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974); *Dacosta v. Laird*, 471 F.2d 1146 (2d Cir. 1973); *Massachusetts v. Laird*, 451 F.2d 26 (1st Cir. 1971); *Dacosta v. Laird*, 448 F.2d 1368 (2d Cir. 1971); *Orlando v. Laird*, 443 F.2d 1039 (2d Cir. 1971), *cert. denied*, 404 U.S. 869 (1971); *Berk v. Laird*, 429 F.2d 302 (2d Cir. 1970); *Atlee v. Laird*, 347 F. Supp. 689 (E.D. Pa. 1972), *aff'd sub nom.*, *Atlee v. Richardson*, 411 U.S. 811 (1973); *Mottola v. Nixon*, 318 F. Supp. 538, (N.D. Cal. 1970), *rev'd. on other grounds*, 464 F.2d 178 (9th Cir. 1972).

56. Although initial challenges that were brought during the early phases of the war were dismissed based on the political question doctrine, the analysis that the courts applied to reach the political question conclusion seemed flawed. While these courts focused on the "textually committed" prong of the *Baker v. Carr* analysis, they based dismissals on the conclusion that the issue of war power was committed to the political branches generally, as opposed to analyzing whether there was a textual commitment of war power to a specific political branch. This resulted in the conclusion that although the exact situs of war power within the government may be uncertain, the certainty that such power was vested in either the executive or legislative branch, or somewhere in between, made the issue a political question. *See* *Luftig v. McNamara*, 373 F.2d 664 (D.C. Cir.) (per curiam), *cert. denied*, 387 U.S. 945 (1967); *United States v. Sisson*, 294 F. Supp. 511 (D. Mass. 1968); *Velvel v. Johnson*, 287 F. Supp. 846 (D. Kan. 1968), *aff'd. sub notn.*, *Velvel v. Nixon*, 415 F.2d 236 (10th Cir. 1969), *cert. denied*, 396 U.S. 1042 (1970). *See also* *Ratner & Cole*, *supra* note 12, at 762 n.212.

57. *See supra* note 55.

58. *See id.*

59. *See* *Ratner & Cole*, *supra* note 12, at 733-34.

President and Congress in supporting the war led to the conclusion that each challenge lacked merit.

It was not until 1990 that a court confronted a real likelihood of conflict between the President and the Congress concerning a decision to wage war. In *Dellums v. Bush*,<sup>60</sup> fifty three-members of the U.S. House of Representatives and one member of the U.S. Senate sought an injunction to prohibit President Bush from initiating any offensive military operation in the Persian Gulf without first obtaining congressional authorization.<sup>61</sup> At the time of the lawsuit, United States forces that would eventually conduct Operation Desert Storm were in Saudi Arabia, and the President, pursuant to a United Nations resolution, made it clear that the United States intended to conduct such offensive operations. At the same time, there was an ongoing debate in Congress on whether to pass a joint resolution to authorize such operations.<sup>62</sup>

Judge Harold Green held that the issue was not sufficiently ripe because Congress had not yet expressed its position.<sup>63</sup> Judge Green made clear, however, that if the President were to ignore a congressional vote to deny authorization to conduct the operation, not only would an injunction be appropriate, but also it would be the proper role of the courts to resolve the deadlock:

While the Constitution itself speaks only of the congressional power to declare war, it is silent on the issue of the effect of a congressional vote that war not be initiated. However, if the War Clause is to have its normal meaning, it excludes from the power to declare war all branches other than the Congress. It also follows that if the Congress decides that United States forces should not be employed in foreign hostilities, and if the Executive does not of its own volition abandon participation in such hostilities, action by the courts would appear to be the only available means to break the deadlock in favor of the constitutional provision.<sup>64</sup>

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60. 752 F. Supp. 1141 (D.D.C. 1990). Several of the constitutional scholars whose works are cited in this article participated in this case either as counsel (Michael Ratner, Jules Lobel) or on amicus curai (John Ely, Louis Henkin, Harold Hongju Koh, Michael Glennon).

61. *Id.* at 1141-42.

62. *Id.*

63. *Id.* at 1149.

64. *Id.* at 1144 n.5.

Taken collectively, these decisions from both the Vietnam and Persian Gulf wars illustrate the potential justiciability of a war power controversy between the two political branches. Each is consistent with the standards enunciated by the Supreme Court in both *Baker v. Carr*<sup>65</sup> and *Goldwater v. Carter*.<sup>66</sup> This consistency further supports the conclusion that a truly ripe war power dispute between the President and Congress would be justiciable and would not automatically be barred by the political question doctrine.<sup>67</sup>

### III. Analytical Framework

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65. See *supra* notes 27-32 and accompanying text.

66. See *supra* notes 35-39 and accompanying text.

67. This is not to suggest that the judiciary would be willing to take on such an issue simply to appease disgruntled legislators. In fact, another doctrine of judicial restraint, known as "equitable discretion," prohibits just such action. In *Crockett v. Reagan*, twenty-nine members of Congress asked a federal court to determine whether the War Powers Resolution was triggered by a relatively minor United States military operation that involved dispatching 56 military advisors to El Salvador. See *Crockett v. Reagan*, 558 F. Supp. 893, *aff'd per curiam*, 720 F.2d 1355 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984). See also War Powers Resolution, Pub. L. No. 93-248, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541-1548 (1988)). In his opinion, Judge Green (the same judge who, in *Dellums v. Bush*, suggested a judicial role for resolving a policy conflict between the President and Congress regarding the Persian Gulf War) wrote:

When a member of Congress is a plaintiff in a lawsuit, concern about separation of powers counsels judicial restraint even where a private plaintiff may be entitled to relief. Where the plaintiffs dispute appears to be primarily with his fellow legislators, [j]udges are presented not with a chance to mediate between two political branches but rather with the possibility of thwarting Congress's will by allowing a plaintiff to circumvent the process of democratic decisionmaking.

*Crockett*, 558 F. Supp. at 902 (citing *Riegle v. Federal Open Mkt. Comm.*, 656 F.2d 873 (D.C. Cir. 1981)).

This case once again illustrates that the jurisdictional pre-requisite is that the two political branches of government be at a true impasse with regard to a war power issue, and not that the case be void of such an issue. The inference drawn from this opinion is that, when the conduct of the President contradicts the express will of Congress on a war power issue, it is the proper role of the judiciary to "mediate between the two political branches." *Id.*

As the foregoing justiciability discussion suggests, the resolution of a war power issue between the political branches would turn on a separation of powers analysis. Determining the likely parameters of such analysis requires an understanding of the locus of war power in the government. That a decision based on "constitutional war powers" implicates foreign affairs considerations requires no explanation. As a result, *United States v. Curtiss-Wright Export Corp.*,<sup>68</sup> is often proposed as authority for analyzing war power issues.<sup>69</sup> This case, in which the Supreme Court characterized the President as the "sole organ of the federal government in the field of international relations,"<sup>70</sup> is relied on to support broad presidential authority over any matter that involves foreign affairs.<sup>71</sup>

Contrary to those who profer *Curtiss-Wright* as a decision template, the usefulness of this precedent as a template for analyzing a war power dispute is questionable. First, despite the "sole organ" language that is often used to support the conclusion that the President is vested with exclusive authority in the foreign affairs arena, this case did not involve a unilateral executive action. In *Curtiss-Wright*, the President acted in accordance with the will of Congress, not contrary to that will.<sup>72</sup> While this case certainly does indicate that the President is the primary actor in the realm of foreign relations, it seems to provide little support for the constitutionality of presidential action contrary to the stated will of Congress

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68. 299 U.S. 304 (1936).

69. See Michael J. Glennon, *The War Powers Resolution: Sad Record, Dismal Promise*, 17 *LOY. L.A. L. REV.* 657, 661-63 (1984). See also Harold Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 *YALE L.J.* 1255.

70. *Curtiss-Wright*, 299 U.S. at 319. This was the precise conclusion of the congressional review of the Iran-Contra affair. In response to assertions that the Boland Amendments ran afoul of the *Curtiss-Wright* precedent and were therefore unconstitutional restrictions of Presidential authority, the majority report stated:

One does not have to be a proponent of an imperial Congress to see that this language has little application to the situation presented here. We are not confronted with a situation where the President is claiming inherent constitutional authority in the absence of an Act of Congress. Instead, to succeed on this argument the Administration must claim it retains authority to proceed in derogation of an Act of Congress . . . .

simply because the action involves foreign affairs. This was expressed emphatically in a subsequent Supreme Court decision:

It is in this class of cases that we find the broadest recent statements of presidential power, including those relied on here. *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, involved not the question of the President's power to act without congressional authority, but the question of his right to act under and in accord with an Act of Congress . . . .

That case . . . recognized internal and external affairs as being in separate categories, and held that the strict limitations upon congressional delegations of power to the President over internal affairs does not apply with respect to delegations of power in external affairs. It was intimated that the President might act in external affairs without congressional authority, *but not that he might act contrary to an Act of Congress* . . . .<sup>73</sup>

The second reason to question the applicability of *Curtiss-Wright* is that it requires the conclusion that war power issues fall exclusively within the realm of foreign affairs, and are therefore controlled by this precedent. This ignores the reality that the decision to wage war has many potentially

71. See, e.g., Report of the Congressional Committees Investigating the Iran-Contra Affair (Iran-Contra Report), S. REP. No. 216, H.R. REP. No. 433 (1987). This report contains the review of the legality of the "Iran-Contra Affair" and specifically addresses the issue of presidential authority to direct "arms for hostages" transactions. The majority report recognized that many proponents of presidential power relied on the "sole organ" language from *Curtiss-Wright* to conclude that the Boland Amendments (which prohibited support for the Nicaraguan Contra Rebels) were unconstitutional.

The analysis must begin, of course, with an appropriate statement of what is, and what is not, the issue. Some have attempted, for example, to cast the Boland Amendments as violative of the Supreme Court's famous dictum in *United States v. Curtiss-Wright Export Corp.*, referring to "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations

*Id.* at 406-07. The report ultimately rejected this conclusion. *Id.* (citing *Curtiss-Wright*, 299 U.S. 304).

72. *Curtiss-Wright*, 299 U.S. at 312.

73. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 n.2 (1952) (emphasis added).

profound domestic consequences.<sup>74</sup> The third reason is that *Curtiss-Wright* represents a “static” theory of powers between the executive and legislature. The history of military operations subsequent to World War II indicates that such a static model of constitutional authority provides minimal utility in analyzing the constitutionality of war power decisions. This history demonstrates that congressional response to decisions that the President makes in the capacity of commander in chief may range from virtually no action<sup>75</sup> to intense debate followed by legislative action either supporting or opposing the planned or ongoing operation.<sup>76</sup> Therefore, while *Curtiss-Wright* certainly provides support for proponents of extensive unilateral executive war powers, its efficacy is arguably transcended by constitutional jurisprudence that reflects a less static and more functional approach to analyzing separation of powers issues.

This “counter-force” in the jurisprudence of separation of powers emerged in *Youngstown Sheet & Tube Co. v. Sawyer*.<sup>77</sup> In this case, the Supreme Court nullified President Truman’s seizure of domestic steel production facilities during the Korean War.<sup>78</sup> In so doing, six justices rejected the government argument that, in the context of the Korean War, the President’s independent constitutional powers justified the seizure. While the direct issue of property seizure was one of “profound and demonstrable domestic impact,”<sup>79</sup> resolution of the issue required a separation of powers analysis within the context of a major armed conflict.<sup>80</sup> Of the six concurring opinions in the result,<sup>81</sup> the two most significant in terms of laying out a model for analyzing separation of powers issues belonged to Justice Frankfurter and Justice Jackson.

Although Justice Frankfurter acknowledged the clearly defined nature of some constitutional authorities, he specifically rejected a “static” model of constitutional analysis:<sup>82</sup> “[T]o be sure, the content of the three branches of government is not to be derived from an abstract analysis. The

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74. See *supra* note 42 and accompanying text.

75. See Ramer & Cole, *supra* note 12, at 740-50 (discussing the range of congressional responses to military operations subsequent to the Vietnam War, such as Grenada and the Mayaguez rescue).

76. See *infra* notes 267-283 and accompanying text.

77. 343 U.S. 579 (1952).

78. *id.*

79. *Goldwater v. Carter*, 444 U.S. 996, 1004 (1979) (Rehnquist, J., concurring in judgment).

80. *Youngstown*, 343 U.S. 579 (1952).

81. *id.*

areas are partly interacting, not wholly disjointed. *The Constitution is a framework for government.*"<sup>83</sup> This directly contradicts the *Curtiss-Wright* model.

In his concurring opinion, Justice Jackson echoed Justice Frankfurter's view on the need to employ a flexible versus static approach to separation of powers analysis. In so doing, he expressed the extreme difficulty of discerning the true meaning of the Constitution when analyzing the constitutionality of presidential power in the modern world.

A judge, like an executive adviser, may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other.<sup>84</sup>

Justice Jackson went on to articulate a "fluctuating" concept of presidential power and to suggest the commonly cited three-tier framework for analyzing issues related to this power:

*Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress. We may well begin by a somewhat oversimplified grouping of practical situations in which a President may doubt, or others may challenge, his powers, and by distinguishing roughly the legal consequences of this factor of relativity.*

1. *When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maxi-*

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82. *Id.* at 603-04 (Frankfurter, J., concurring).

Absence of authority in the President to deal with a crisis does not imply want of power in the government. Conversely the fact that power exists in the government does not vest it in the President. The need for new legislation does not enact it. Nor does it repeal or amend existing law . . . .

*Id.*

83. *Id.* at 610 (Frankfurter, J., concurring) (emphasis added).

84. *Id.* at 634-35 (Jackson, J., concurring).



*mum*, for it includes all that he possesses in his own right plus all that Congress can delegate . . . .

2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which its distribution is uncertain. Therefore, *congressional inertia, indifference, or quiescence may sometimes, at least as a practical matter, enable, f not invite, measures on independent presidential responsibility.* . . .

3. *When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb*, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. *Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.*<sup>85</sup>

The true efficacy of this self-proclaimed “somewhat over-simplified grouping”<sup>86</sup> three-tier analytical template is the focus on the level of concurrence between the two political branches concerning issues of nebulous constitutional authority. Although it emerged from a case that involved a domestic “taking,” this analytical template is ideally suited to resolving challenges to presidential war power decisions. It recognizes and accounts for the reality that the language of the Constitution is insufficient to resolve every challenge to the authority of the President. It validates the efficacy of cooperative decisionmaking between the political branches, while sug-

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85. *Id.* at 635-38 (Jackson, J., concurring) (emphasis added).

86. *Id.*

gesting that the courts should closely scrutinize presidential actions that have the effect of nullifying the constitutional role of Congress.<sup>87</sup>

Even assuming that Justice Jackson's analytical framework is applicable only to issues that involve domestic constitutional implications, the conclusion that it is wholly inapplicable to a war power controversy. It is reasonable to conclude that the decision to take the nation to war impacts not only international affairs, but also domestic interests.<sup>88</sup> If anything, it seems that the scope of the conflict generating the controversy, and not the "war power" nature of the controversy, could decide whether a war power decision would be considered to be "an action of profound and demonstrable domestic impact."<sup>89</sup>

The *Youngstown* framework arguably assumed full precedential value<sup>90</sup> in *Dames & Moore v. Reagan*.<sup>91</sup> *Dames & Moore* involved a challenge to an executive order<sup>92</sup> that terminated all claims against Iran that were pending in American courts.<sup>93</sup> The executive order was issued pur-

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87. A number of war power cases decided during the Vietnam War illustrate the utility of such a functional approach to analyzing war power authority. These cases sustained the constitutionality of presidential prosecution of the war in Vietnam based on the cooperative policy of both political branches. See *infra* notes 170-262 and accompanying text. While these cases did not explicitly invoke the *Youngstown* template, they still validate the utility of focusing on the level of cooperation between the President and Congress when analyzing the constitutionality of a decision that involves a nebulous or "shared" constitutional authority.

88. See *supra* note 42 and accompanying text.

89. *Goldwater v. Carter*, 444 U.S. 996, 1004 (1979) (Rehnquist, J., concurring in judgment).

90. While this model may be extremely useful when analyzing a war power dispute, and may be relied on by a court that faces such an issue, it is important to note that while *Dames & Moore* turned on a separation of powers analysis, the Court carefully limited the holding to the specific issue presented: "[W]e attempt to lay down no general 'guidelines' covering other situations not involved here, and attempt to confine the opinion only to the very questions necessary to decision of the case." *Dames & Moore v. Reagan*, 453 U.S. 654, 661 (1981). This caveat seemed to be motivated by the Court's concern that it adjudicate such separation of powers disputes only when absolutely necessary. *Id.*

In addition, the value of this framework for resolving a war power controversy may, as a practical matter, be diminished by the fact that it remains a concurring opinion, regardless of the endorsement that *Dames & Moore* seemed to give it. Furthermore, characterization by a court of a war power dispute as a "foreign affairs" issue may also diminish the value of this framework, which, as the majority indicated in *Goldwater v. Carter*, involved resolution of a domestic "taking" by the government. See *supra* note 42 and accompanying text.

91. 453 U.S. at 654.

92. Exec. Order No. 12,170, 3 C.F.R. 457 (1980).

suant to an agreement that related to the release of the U.S. hostages who were being held in Iran. Because of an absence of specific statutory authority for such an action, the issue before the Court was the constitutionality of the “sole” executive order.<sup>94</sup>

In analyzing this issue, the Court expressed the importance of following the essence of Justice Jackson’s tiered approach, particularly in cases involving international crises:

Justice Jackson himself recognized that his three categories represented “a somewhat over-simplified grouping,” and it is doubtless the case that executive action in any particular instance falls, not neatly in one of the three pigeonholes, but rather at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition. This is particularly true as respects cases such as the one before us, involving responses to international crises the nature of which Congress can hardly have been expected to anticipate with any detail.<sup>95</sup>

Applying this analytical template, the Court upheld the legality of the executive order based on related legislation and legislative history that evinced congressional approval of the practice of presidential settlement of foreign claims.<sup>96</sup> According to the Court, such closely related legislation as the International Emergency Economic Powers Act<sup>97</sup> and the Hostage Act<sup>98</sup> was “highly relevant in the looser sense of indicating congressional acceptance of a broad scope for executive action in circumstances such as

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93. *Dames & Moore*, 453 U.S. at 660.

94. *Id.* See generally Hugh C. Keenan, *Executive Orders: A Brief History of Their Use and the President’s Power to Issue Them*, in Senate Special Committee on National Emergencies and Delegated Emergency Powers, 93d Cong., 2d Sess., *Executive Orders in Times of War and National Emergency* 20 (Comm. Print 1974). See also PETER M. SHANE AND HAROLD H. BRUFF, *THE LAW OF PRESIDENTIAL POWER: CASES AND MATERIALS* (1988).

95. *Dames & Moore*, 453 U.S. at 669 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)).

96. *Id.* at 655.

97. 50 U.S.C. §§ 1701-1706 (1976 ed., Supp. III).

98. 22 U.S.C. § 1732 (1994).

those presented in this case," especially in light of the history of claims settlement.<sup>99</sup> The Court stated:

[W]e cannot ignore the general tenor of Congress' legislation in this area in trying to determine whether the President is acting alone or at least with the acceptance of Congress . . . Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act. Such failure of Congress specifically to delegate authority does not, "especially. . . in the areas of foreign policy and national security," imply "congressional disapproval" of action taken by the Executive . . . On the contrary, the enactment of legislation closely related to the question of the President's authority in a particular case that evinces legislative intent to accord the President broad discretion may be considered to "invite measures of independent responsibility" . . . . *At least this is so where there is no contrary indication of legislative intent and when, as here, there is a history of congressional acquiescence in conduct of the sort engaged in by the President.*<sup>100</sup>

This refinement of the *Youngstown* framework for analyzing separation of powers issues provides an effective model for resolving war power disputes.' In *Dames & Moore*, it explicitly applied to foreign affairs and national security issues, even where the legislature could not anticipate such issues and where rapid executive action is required.<sup>101</sup>

While this approach appears more flexible than Justice Jackson's model,<sup>102</sup> the Court made it clear that when a case involves an issue of uncertain constitutional authority, implied or express congressional approval of presidential conduct remains the critical element to finding such conduct constitutional.<sup>103</sup> Most importantly, the Court reaffirmed Justice Jackson's position that the President's constitutional authority is at its lowest point where the action is contrary to the express or implied will of Congress. As the Court noted, "[j]ust as importantly, Congress has not

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99. *Dames & Moore*, 453 U.S. at 677.

100. *Id.* at 678 (citing *Haig v. Agee*, 453 U.S. 280 (1981); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)) (emphasis added)).

101. *Id.*

102. See *supra* note 85 and accompanying text.

103. *Dames & Moore*, 453 U.S. at 680. "Crucial to our decision today is that Congress has implicitly approved the practice of claim settlement by executive agreement." *Id.*

disapproved of the action taken here. Though Congress has held hearings on the Iranian Agreement itself, Congress has not enacted legislation, or even passed a resolution, indicating its displeasure with the **Agreement**.”<sup>104</sup> A review of cases that specifically involve war power issues illustrates that, from the earliest days of the nation’s history, courts analyzed these issues by relying on a virtually identical approach to analyzing separation of powers issues.

#### IV. The Early Cases

The *Youngstown* and *Dames & Moore* “shared power” framework for analyzing war power issues is premised on the assumption that the authority to make war power decisions is shared between the two political branches of government. A predicate issue, however, is what constitutes “war” for purposes of this analysis. Are war powers “shared” only in the case of a declared war? In the alternative, is undeclared conflict nonetheless a “war” for constitutional war power purposes? These questions were answered in one of the first cases in the nation’s history to deal with a war power issue, *Bas v. Tingy*.<sup>105</sup> That case established the concept of “perfect” versus “imperfect” war,<sup>106</sup> supporting the conclusion that any conflict between the United States and a foreign nation constitutes war, regardless of whether there is a formal declaration.

In *Bas*, Captain Tingy, the captain of the U.S.S. *Ganges*, sought compensation pursuant to an act of Congress, for the recapture from the French of a U.S. merchant ship belonging to **Bas**.<sup>107</sup> The issue was whether Tingy was entitled to compensation based on a 1798 act of Congress governing recapture of ships from the “French” or the higher amount of compensation based on a 1799 act of Congress governing the recapture of ships from the “**enemy**.”<sup>108</sup> This required judicial resolution of whether, absent a declaration of war, the state of hostilities existing at the time between the United States and France amounted to a “war” for the purposes of labeling France “the enemy,” thereby triggering the latter statute.<sup>109</sup> Each justice of the Court, writing separately, concluded that although undeclared, a state of war did nonetheless exist between the United States and **France**.<sup>110</sup> Jus-

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104. *Id.* at 687.

105. 4 **US** .(4 Dall.) 37 (1800).

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 39.

tice Washington articulated the distinction between “perfect” versus “imperfect” war:

It may, I believe, be safely laid down, that every contention by force between two nations, in external matters, under the authority of their respective governments, is not only war, but also public war. If it be declared in form, it is called solemn, and is of the perfect kind; because one whole nation is at war with another whole nation . . . .

But hostilities may subsist between two nations more confined in its nature and extent; being limited as to places, persons, and things; and this is more properly termed imperfect war; because not solemn . . . [s]till, however, it is *public* war, because it is an external contention by force, between some of the members of the two nations, authorised by the legitimate powers. It is a war between the two nations . . . .<sup>111</sup>

Justice Washington then proffered a pragmatic explanation of why relations between France and the United States fell into the category of “war,” thereby entitling Captain Tingy to the higher amount of compensation.

Here then, let me ask, what were the technical characters of an American and French armed vessel, combating on the high seas, with a view the one to subdue the other, and make prize of his property? They certainly were not friends, because there was a contention of force; nor were they private enemies, because the contention was external, and authorised by the legitimate authority of the two governments. If they were not our enemies, I know not what constitutes an enemy.<sup>112</sup>

Justices Chase and Patterson also concluded that war existed absent any declaration to that effect. According to Justice Chase:

Congress is empowered to declare a general war, or congress may wage a limited war; limited in place, in objects, and in time. If a general war is declared, its extent and operations are only restricted and regulated by the *jus belli*, forming a part of the law

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110. *Id.*

111. *Id.* at 40.

112. *Id.* at 43-46

of nations; but if a partial war is waged, its extent and operation depend on our municipal laws.

What, then, is the nature of the contest subsisting between America and France? In my judgment, it is a limited, partial, war. Congress has not declared war in general terms; but congress has authorised hostilities on the high seas by certain persons in certain cases. *There is no authority given to commit hostilities on land; to capture unarmed French vessels; nor even to capture French armed vessels lying in a Frenchport . . .* So far it is, unquestionably, a partial war; but, nevertheless, it is a public war, on account of the public authority from which it emanates. . . .

Not long after *Bas*, the Court addressed the issue of constitutional power to authorize military operations short of a formally declared war. In *Talbot v. Seeman*,<sup>114</sup> the Supreme Court again addressed the undeclared conflict with France and reaffirmed the significance of congressional participation to authorize even an undeclared “imperfect” war. In this case, the captain of the U.S.S. Constitution captured the plaintiff’s merchant ship while it was flying a French flag. The owner of the ship subsequently sued the captain in libel for the value of the ship.<sup>115</sup> The captain seized the

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113. *Id.* at 43 (emphasis added). According to Justice Patterson:

The United States and the French republic are in a qualified state of hostility. An imperfect war. *As sofar as Congress tolerated and authorised the war on our part, sofar may we proceed in hostile operations.* It is therefore a public war between the two nations, qualified, on our part, in the manner prescribed by the constitutional organ of our country. In such a state of things, it is scarcely necessary to add, that the term “enemy” applies. . . .

*Id.* at 45-46 (emphasis added). This language, particularly that emphasized, certainly suggests that it is for Congress alone to decide when and in which ~~type~~ of military hostilities the United States will engage. Although beyond the scope of this article, it even suggests that Congress can limit the type of operations employed to achieve an authorized objective. If the limited authority Congress granted to conduct naval operations against France precluded “hostilities on land,” could Congress have constitutionally limited Operation Desert Storm to a naval blockade and air war? If they had authorized only the use of naval and air power to achieve the United Nations objectives, would an order to conduct the ground war have been constitutional? Fortunately, such a conflict between the Congress and the President seems even less likely today than even a direct dispute over whether to conduct an operation in general.

114. 5 U.S. (1 Cranch) 1 (1801).

ship in response to orders that had been issued by President Jefferson.<sup>116</sup> The district court ordered the captain to return the ship to its owners, but the circuit court reversed this decision.<sup>117</sup> The Supreme Court concluded that the seizure had been legal and ruled in favor of the captain.<sup>118</sup> The sole basis for this conclusion, however, was not the orders of the President<sup>119</sup> but the congressional authorization to conduct such seizures. According to the Court:

In order to decide on the right of Captain Talbot it becomes necessary to examine the relative situation of the United States and France at the date of the re-capture.

The whole powers of war being, by the Constitution of the United States, vested in Congress, the acts of that body can alone be resorted to as our guides in this enquiry. It is not denied, nor in the course of the argument has it been denied, that congress may authorize general hostilities . . . or partial hostilities.<sup>120</sup>

This language strongly suggests that early in the nation's history, those who were charged with interpreting the Constitution had little difficulty determining that the power to authorize war, whether declared (perfect) or undeclared (imperfect), was vested in Congress.<sup>121</sup> This was particularly so when, as in this case, Congress had already acted on the subject of whether or not the nation should engage in hostilities. The Court's focus on the authority granted by Congress, and not the orders of the President, suggests that once Congress occupied the field, it had the exclusive authority to determine the scope of hostilities.<sup>122</sup>

A more direct enunciation of this principle occurred in 1804, when the undeclared war with France provided the backdrop for the only Supreme Court decision in U.S. history that suggests that the President lacked constitutional authority to order a military operation. In *Little v.*

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115. *Id.* at 1-2.

116. *Id.* at 3.

117. *Id.* at 3-4.

118. *Id.* at 36.

119. *Id.* at 28.

120. *Id.*

121. Justice Marshall's citation to this quotation in his opinion in *Holtzman v. Schlesinger* highlights the continued significance of this constitutional interpretation to modern analysis of war powers. See *Holtzman v. Schlesinger*, 414 U.S. 1304, 1312 (1973). According to Justice Marshall: "In my judgment, nothing in the 172 years since those words were written alters that fundamental constitutional postulate." *Id.*

122. *Talbot*, 5 U.S. (1 Cranch) 1.



*Barreme*,<sup>123</sup> the Prussian owner of a Danish merchant ship sued a U.S. Navy captain for seizing the ship.<sup>124</sup> The seizure had been conducted in accordance with orders issued by the President.<sup>125</sup> In the words of the Court, the orders "given by the executive under the construction of the act of Congress made by the department to which its execution was assigned, enjoin the seizure of *American* vessels sailing from a *French* port."<sup>126</sup> Those orders, however, exceeded the scope of the statutory authority granted by Congress for conducting such seizures, which "allowed for seizure of American ships sailing to, and not from, French ports."<sup>127</sup> The captain asserted that his conduct was legal because he acted in accordance with the President's orders.<sup>128</sup> Thus, the specific issue before the Court was whether the President possessed constitutional authority to order combat operations that exceeded a limited congressional authorization.

The Court held the captain liable.<sup>129</sup> Chief Justice Marshall indicated that once Congress set the parameters of military operations, the President could not constitutionally authorize transcending those parameters, and an order to that effect could therefore not serve to immunize a military leader from personal liability:

These orders, given by the executive under the construction of the act of congress made by the department to which its execution was assigned, enjoin the seizure of American vessels sailing from a French port. Is the officer who obeys them liable for damages sustained by this misconstruction of the act, *or will his orders excuse him?* . . . .

I confess the first bias of my mind was very strong in favor of the opinion that though the instructions of the executive could not give a right, they might yet excuse from damages . . . . That implicit obedience which military men usually pay to the orders of their superiors, which indeed is indispensably necessary to every military system, appeared to me strongly to imply the principle that those orders, if not to perform a prohibited act, ought to justify the person whose general duty it is to obey them, and who is placed by the laws of his country in a situation which in

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123. 6 U.S. (2 Cranch) 170 (1804).

124. *Id.* at 172.

125. *Id.* at 175.

126. *Id.* at 178.

127. *Id.*

128. *Id.* at 172-73.

129. *Id.* at 179.

general requires that he should obey them . . . . But I have been convinced that I was mistaken, and I have receded from this first opinion. I acquiesce in that of my brethren, which is, that the instructions cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass . . . .

Captain Little then must be answerable in damages to the owner of this neutral vessel.<sup>130</sup>

The notion of holding a military officer personally liable in a libel action may seem a legal anachronism. However, the conclusion that Congress is vested with the authority to set limitations on the conduct of military operations during an undeclared war, limits not even the President may transgress, is undeniably significant.<sup>131</sup> This conclusion is bolstered by the fact that Chief Justice Marshall actually acknowledged a broad scope of inherent presidential power to order military conduct absent any congressional authorization, but obviously felt that this authority ended when Congress spoke.

It is by no means clear that the president of the *United States* whose high duty it is to “take care that the laws be faithfully executed,” and who is commander in chief of the armies and navies of the *United States*, might not, without any special authority for that purpose, in the then existing state of things, have empowered the officers commanding the armed vessels of the *United States*, to seize and send into port for adjudication, *American* vessels which were forfeited by being engaged in this illicit commerce. But when it is observed that the general clause of the first

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130. *Id.* at 178-79 (emphasis added).

131. In fact, approximately 150 years later, this holding compelled Justice **Clark** to rule against President Truman in *Youngstown Sheet & Tube*.

In my view—taught me not only by the decision of Mr. Chief Justice Marshall in *Little v. Barreme*, but also by a score of other pronouncements of distinguished members of this bench—the Constitution does grant to the President extensive authority in times of grave and imperative national emergency . . . . I cannot sustain the seizure in question because here, as in *Little v. Barreme*, Congress had prescribed methods to be followed by the President in meeting the emergency at hand.

section of the “act, which declares that such vessels may be seized . . .” obviously contemplates a seizure within the *United States*; and that the 5th section gives a special authority to seize on the high seas, and limits that authority to the seizure of vessels bound or sailing to *French* ports, the legislature seem to have prescribed that manner in which this law shall be carried into execution, was to exclude seizure of any vessel not bound to a *French* port.<sup>132</sup>

The fact that Chief Justice Marshall authored the opinion only adds to this significance.<sup>133</sup>

Another example of a judicial review of an assertion of orders from the President as a defense to a charge of illegal military activity is *United States v. Smith*.<sup>134</sup> This case, from the same period, involved a defendant charged with violating the Neutrality Act of 1794 by conducting a military expedition against Spanish territory.<sup>135</sup> Although not a member of the U.S. military, Smith asserted that the President had personally instructed him to conduct the operation.<sup>136</sup> The issue in the case, which was decided by Supreme Court Justice Patterson sitting as a circuit justice, was whether it was necessary to subpoena the secretary of state to establish the veracity of the defense assertion.<sup>137</sup>

Justice Patterson concluded that, even if the testimony of the secretary proved that the President did direct the operation, it would not provide a defense, because the President lacked authority to approve such an operation.<sup>138</sup> According to his opinion, only Congress possessed the constitutional authority to direct acts of hostility against a nation that was at peace with the United States.<sup>139</sup> Written by a Justice of the Supreme Court, who had also served as a member of the Constitutional Convention, the conclusion that Congress alone could authorize acts of hostilities against foreign

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132. *Little*, 6 U.S. (2 Cranch) at 177-78.

133. This seems particularly true considering that it was Chief Justice Marshall who first coined the phrase that the President was the “sole organ of the nation in its external relations, and its sole representative with foreign nations.” See *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 319 (1936) (quoting Congressman John Marshall).

134. 27 F. Cas. 1192 (C.C.S.D.N.Y. 1806) (No. 16,342).

135. *Id.* at 1196-97.

136. *Id.*

137. *Id.* at 1192-94.

138. *Id.* at 1228-31.

nations is another indication that the Constitution provides for a significant congressional role in such decisions.

These three cases all suggest the same two-prong conclusion: (1) that the express will of Congress on the question of authorizing acts of hostility against another nation serves as a powerful limitation on presidential war power and (2) that presidential orders that are contrary to this express will do not necessarily carry the force of law.<sup>140</sup> Furthermore, based on these cases, it is reasonable to infer that express congressional action that prohibits the use of force (as opposed to granting a limited authorization for such use), can bind the President.

These decisions are therefore not only consistent with Justice Jackson's view that executive power is at its lowest point when it contradicts the express will of Congress,<sup>141</sup> but also establish the principle that the President's constitutional powers do not permit transgressing congressionally imposed limitations on the use of the armed forces. However, each of these decisions also suggests that the President does possess some inherent authority to employ military force, albeit insufficient to authorize such employment against the express will of Congress. Instead, the cases suggest that this inherent authority extends to responding to emergency situations, such as suppression of rebellion or repelling a sudden attack or invasion.<sup>142</sup> This "emergency" authority, which is traceable back to the Constitutional Convention,<sup>143</sup> received explicit recognition by the Supreme Court during the Civil War.

In 1861, during congressional recess, President Lincoln ordered a blockade of Southern ports in response to the rebellion of the Southern states.<sup>144</sup> Ships captured while attempting to violate the blockade were

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139. *Id.* at 1230-31.

There is a manifest distinction between our going to war with a nation at peace, and a war being made against us by an actual invasion, or a formal declaration. In the former case, it is the exclusive province of congress to change a state of peace into a state of war . . . the organ intrusted with the power to declare war should first decide whether it is expedient to go to war . . . and until such a decision be made, no individual ought to assume an hostile attitude; and to pronounce, contrary to the constitutional will, that the nation is at war, and that he will shape his conduct an act according to such a state of things.

sold as prize. In 1862, a consolidated case that challenged the constitutionality of the blockade and the subsequent prize actions reached the Supreme Court as the *Prize Cases*.<sup>145</sup>

The Supreme Court first addressed the nature of the conflict and concluded that the rebellion by the Southern states amounted to a war.<sup>146</sup> The Court then held that the Constitution vested the President with authority to

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140. See 7 J. MOORE, DIGEST OF INT'L LAW 123 (1906) (quoting 7 JEFFERSON'S WORKS 628.

[T]he framers gave Congress virtually exclusive power to initiate war, whether declared or undeclared, perfect or imperfect.

"The power to 'grant letters of marque and reprisal' refers to the authority to initiate an imperfect kind of limited war, or those acts of hostility which sovereigns exercise against each other, or, with their consent, the subjects of foreign commonwealth, that refuseth to do justice . . . ." The framers gave Congress this power in order to remove any remaining doubt about the authority of Congress, as opposed to the President, to authorize undeclared hostilities. Those war-making powers not within the "declare war" provision were residual in the "grant letters of marque and reprisal" provision . . . .

Jefferson recognized the importance of granting Congress authority to grant letters of marque and reprisal:

The making of a reprisal on a nation is a very serious thing. Remonstrance and refusal of satisfaction ought precede; and when reprisal follows, it is considered an act of war. . . . [I]f the case were important and ripe for that step, Congress must be called upon to take it; the right of reprisal being expressly lodged with them by the Constitution, and not the Executive.

*Id.* (quoting 2 J. BURLAMAQUI, THE PRINCIPLES OF NATURAL AND POLITICAL LAW 258 (3d ed. 1784). See Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672,692-700 (1972)); Ratner & Cole, *supra* note 12, at 721-22.

141. See *supra* note 85 and accompanying text.

142. See *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 177 (1804); *United States v. Smith*, 27 F. Cas. 1192, 1229-31 (C.C.S.D.N.Y. 1806) (No. 16,342).

143. "The one alteration noted in the constitutional grant of congressional war powers is the substitution of 'declare' for 'make.' The well-established reason for this change was, according to Madison, to leave to the Executive 'the power to repel sudden attacks.'" Ratner & Cole, *supra* note 12, at 722 n.25 (citing 2 RECORDS OF THE FEDERAL CONVENTION OF 1789, at 318-19 (M. Farrand rev. ed. 1966)). See Lofgren, *supra* note 140.

144. *Prize Cases*, 67 U.S. (2 Black) 635,640-43 (1862).

145. *Id.* at 636-37.

146. *Id.* at 652. "War is simply the exercise of force by bodies politic, or bodies assuming to be bodies politic, against each other, for the purpose of coercion." *Id.*

respond to a military challenge with force and that this authority was not contingent on congressional authorization.<sup>147</sup>

If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force, by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or states organized in rebellion, it is none the less a war, although the declaration of it be unilateral.<sup>148</sup>

According to the Court, while Congress alone had the constitutional power to initiate war,<sup>149</sup> in the case of war being "thrust" upon the nation, the President alone decides how to meet the challenge.<sup>150</sup>

Based on the recognition of an inherent executive authority to repel an attack that is "thrust upon" the nation,<sup>151</sup> the *Prize Cases* support the

147. *Id.* at 668.

148. *Id.*

149. "[The question] is as to the power of the President before Congress shall have acted, in case of a war actually existing. It is not as to the right *to initiate a war, as a voluntary act of sovereignty. That power is vested only in Congress.*" *Id.* at 660 (emphasis added).

150. *Id.* at 669. While the Court noted that there had been congressional ratification of the President's actions after Congress came into session, it made clear that this was not regarded as a prerequisite to the constitutionality of the President's actions, but served only to rebut any assertion that the orders were illegal. "[W]ithout admitting that such an act was necessary under the circumstances, it is plain that if the President had in any manner assumed powers which it was necessary should have the authority or sanction of Congress . . . this ratification has operated to perfectly cure the defect." *Id.* at 671.

This caveat that congressional action was not a prerequisite to the authority of the President to respond to war being "thrust" on the nation distinguishes the holding from the first case to address the power of the President to respond to attack on the nation, *Martin v. Mott*. See *Martin v. Mott*, 25 U.S. 19 (1813). In that case, the Supreme Court discussed the authority of the President to repel an invasion within the context of the War of 1812. The Court concluded that the President alone must judge whether the nation must use military force to react to an invasion. *Id.* at 29-30. However, this authority was exercised pursuant to a statutory delegation that authorized the President to call forth the militia "as he may judge necessary to repel such invasion." *Id.* at 31-32. Based on this delegation, the Court concluded that the discretion exercised by the President was one of exercising the delegation, and not one of independent constitutional authority. *Id.*

151. This accords with the position of virtually all of the scholars who have addressed this issue. See, e.g., Lofgren, *supra* note 140; Glennon, *supra* note 69; Ratner & Cole, *supra* note 12; Christopher J. Pace, *The Art of War Under the Constitution*, 95 DICK. L. REV. 557 (1991).

conclusion that the blockade order would have survived the constitutional challenge, even if it contradicted the express will of Congress. Unlike the cases generated by the undeclared war with France, the President derived the authority to issue the blockade orders exclusively from Article 11. Therefore, unlike the “undeclared war” cases, had Congress attempted to limit this authority, the limit would have been an unconstitutional intrusion on the authority of the President. The Court made it clear, however, that the President’s authority did not extend to initiating war, regardless of whether such a war is declared. “[The President] has no power to *initiate or declare* a war either against a foreign nation or a domestic state.”<sup>152</sup>

This result is not inconsistent with the *Youngstown* template.<sup>153</sup> President Lincoln acted in the face of congressional silence; therefore, his action fell within Justice Jackson’s “twilight zone,”<sup>154</sup> where the President “and Congress may have concurrent authority, or in which its distribution is uncertain.”<sup>155</sup> If President Lincoln’s action had been “incompatible with the expressed or implied will of Congress,”<sup>156</sup> only the President’s own constitutional power could serve ‘as a valid constitutional basis for the order. By holding that the constitutionality of the President’s actions was not contingent upon any legislation, the Supreme Court recognized just such an independent source of authority.’<sup>157</sup> With this decision, the Supreme Court demonstrated the critical aspect of determining the specific nature of a conflict when analyzing the constitutionality of executive war power decisions, a factor which may be determinative in any future executive and legislative dispute.

## VI. Steel Seizure: The Substance

Nearly one hundred years passed between the *Prize Cases* and the next significant war power decision. During the Korean War, the Supreme Court again addressed the extent of the President’s inherent war power. While *Youngstown Sheet & Tube*<sup>158</sup> profoundly impacted the jurisprudence of separation of powers issues, the case centered on the power of the President to maintain military production in the context of a major war.<sup>159</sup> The

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152. *Prize Cases*, 67 U.S. (2 Black) at 668 (emphasis added).

153. See *supra* note 85 and accompanying text.

154. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952).

155. *Id.*

156. *Id.*

157. See *supra* notes 144-150 and accompanying text.

158. *Youngstown Sheet & Tube Co.*, 343 U.S. at 579.

specific issue of the case was “whether the President was acting within his constitutional power when he issued an order directing the Secretary of Commerce to take possession of and operate most of the Nation’s steel mills.”<sup>160</sup> Although this issue involved a domestic “taking,” the case is also a valuable enunciation of certain aspects of the commander in chief power.<sup>161</sup>

To justify the seizure of domestic steel production, the government argued that the “action was necessary to avert a national catastrophe . . . and that in meeting this grave emergency the President was acting within the aggregate of his constitutional powers as the nation’s chief executive and the commander in chief of the armed forces of the United States.”<sup>162</sup> In response, six members of the Court, each writing separately, joined to strike down the seizure as unconstitutional.<sup>163</sup> Each of them rejected the argument that the commander in chief power justified the seizure.<sup>164</sup> All the opinions suggested that the commander in chief clause of the Constitution does not vest the President with unlimited war power and that the **risk** of detriment to national security does not justify judicial affirmation of an expansion of the limited authority derived from that provision.<sup>165</sup> In

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159. *Id.* at 582-84.

160. *Id.* at 582.

161. This was not the first time the Supreme Court specifically addressed the scope of the commander in chief power. In *Flemming v. Page*, the Court analyzed whether the presidentially ordered occupation of an enemy port, during the congressionally declared war with Mexico, resulted in annexation of the territory. *Flemming v. Page*, 50 U.S. (9 How.) 602 (1851). The Court unanimously concluded that the occupation could not convert the territory to a possession of the United States and that, as commander in chief, the President’s role was to execute the authority granted by law. *Id.* at 614-15.

[The President’s] duty and power are purely military. **As** commander in chief, he is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy. He may invade the hostile country and subject it to the sovereignty and authority of the United States. But his conquests do not enlarge the boundaries of this Union, nor extend the operation of our institutions and laws beyond the limits assigned to them by the legislative power.

*Id.*

162. *Youngstown*, 343 U.S. at 582.

163. *Id.* at 580-82.

164. *Id.* at 587.

165. *Id.*



rejecting the argument that necessity to respond to a national crisis justified the seizure and that national security concerns necessitated support for the President, Justice Frankfurter wrote:

A scheme of government like ours no doubt at times feels the lack of power to act with complete, all-embracing, swiftly moving authority. No doubt a government with distributed authority, subject to be challenged in the courts of law, at least long enough to consider and adjudicate the challenge, labors under restrictions from which other governments are free. It has not been our tradition to envy such governments. In any event our government was designed to have such restrictions. The price was deemed not too high in view of the safe-guards which these restrictions afford . . . .<sup>166</sup>

Justice Jackson's articulation of this limited scope of the commander in chief power validates the need to determine whether the President can point to congressional support to constitutionally justify decisions to use military force.

There are indications that the Constitution did not contemplate that the title Commander in Chief *of the Army and Navy* will constitute him also as Commander in Chief of the country . . . . [H]e has no monopoly of "war powers," whatever they are. While Congress cannot deprive the President of the command of the army and navy, only Congress can provide him an army and navy to command. . . .

While broad claims under this rubric often have been made, advice to the President in specific matters usually has carried overtones that powers, even under this head, are measured by command functions usual to the topmost officer of the army and navy. *Even then, heed has been taken of any efforts of Congress to negative this authority.*<sup>167</sup>

Even a narrow interpretation of this case suggests that executive war power is not a license to transgress the constitutional scheme of government.<sup>168</sup> In the context of other cases that hold that the constitution does not envision unilateral executive war power authority, this supports the conclusion that short of imminent attack or invasion, "national security" never justifies executive disregard of express congressional will. A review

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166. *Id.* at 633-34, (Frankfurter, J., concurring).

of a number of federal court decisions involving war power issues during the Vietnam War validates this conclusion. These cases confirm that the Constitution mandates a significant, albeit amorphous, role for Congress in this constitutional process for authorizing military hostilities beyond the category of responding to "war being thrust upon the nation."<sup>169</sup>

## VII. The Vietnam Decisions

No conflict in United States history generated more war power controversy than the Vietnam War.<sup>170</sup> This controversy often manifested itself in judicial challenges to the constitutionality of the war. The resolution of these challenges provide both an example of application of the political question doctrine to war powers<sup>171</sup> and an indication of the type of coop-

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167. *Id.* at 643-45 (Jackson, J., concurring) (emphasis added). Justice Douglas also rejected the argument that necessity mandated support for the President:

Stalemates may occur when emergencies mount and the nation suffers for lack of harmonious, reciprocal action between the White House and Capitol Hill. That is a risk inherent in our system of separation of powers

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We pay a price for our system of checks and balances, for the distribution of power among the three branches of government. It is a price that today may seem exorbitant to many.

*id.* at 633-34 (Douglas, J., concurring).

168. The precedential value of this case to a war power dispute is debatable. Characterization of such a dispute as either a purely foreign affairs issue or one involving domestic concerns seems to be a condition precedent to determining whether the holding of this case is applicable. This was highlighted by the plurality in *Goldwater v. Carter* when they rejected the applicability of the *Youngstown* holding to a pure foreign affairs issue. *See Goldwater v. Carter*, 444 U.S. 996 (1979); *supra* note 42 and accompanying text. *See also* JOHN NORTON MOORE ET AL., NATIONAL SECURITY LAW 773 (1990). As indicated previously, however, many of the factors used to determine whether a case involves a domestic issue, which, according to the Court, were absent in *Goldwater*, seem to be implicated by a war power controversy. *See supra* note 42 and accompanying text.

Assuming, *arguendo*, that the analysis of *Youngstown* might be applied to a war power controversy, some of the language used by the Court seems particularly compelling, and in fact seems directed more towards national security than any other concern.

169. *See supra* note 149 and accompanying text.

170. *See* Ratner & Cole, *supra* note 12, at 730.

171. *See supra* note 56 and accompanying text.

eration between the President and Congress that is essential to the constitutionality of a future war power decision.

When litigants first began to challenge the constitutionality of orders sending them to Vietnam, requiring judicial resolution of whether the war had been legally authorized, the judicial response was application of the political question doctrine to the general issue of what was a lawful war.<sup>172</sup> This resulted in dismissal of these early challenges.<sup>173</sup> These cases were dismissed as political questions on the grounds that the decision to go to war was committed to the coordinate branches of government.

Later decisions reflected a more careful application of the doctrine. Instead of concluding that the decision to wage war was committed to the coordinate branches, and was therefore non-justiciable, the fact that the decision was committed to *both* coordinate branches meant that ascertaining whether each had played a role in the decision was *not* a political question. Only after determining that Congress supported the war, and thereby played its constitutional role, did the courts apply the political question doctrine—not to the question of whether Congress had a role to play in the decision to wage war, but in the narrower question of whether the evidence demonstrated that the level of support was constitutionally sufficient. Thus, although these later cases also ran afoul of the political question doctrine, this more discriminating analysis of what amounts to a political question led once again to a validation of the need for congressional support for presidential war power decisions.

The first example of this, *Berk v. Laird*,<sup>174</sup> involved an Army enlistee's challenge to orders sending him to Vietnam.<sup>175</sup> The district court denied his request for a preliminary injunction against the Secretary of Defense and those subordinate officers who signed his orders.<sup>176</sup> The circuit court affirmed and specifically addressed the issue of constitutional

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172. See Ratner & Cole, *supra* note 12, at 727 (citations omitted).

173. See, e.g., *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974); *Dacosta v. Laird*, 471 F.2d 1146 (2d Cir. 1973); *Massachusetts v. Laird*, 451 F.2d 26 (1st Cir. 1971); *Dacosta v. Laird*, 448 F.2d 1368 (2d Cir. 1971); *Orlando v. Laird*, 443 F.2d 1039 (2d Cir. 1971), *cert. denied*, 404 U.S. 869 (1971); *Berk v. Laird*, 429 F.2d 302 (2d Cir. 1970); *Atlee v. Laird*, 347 F. Supp. 689 (E.D. Pa. 1972), *aff'd sub nom.*, *Atlee v. Richardson*, 411 U.S. 811 (1973); *Mottola v. Nixon*, 318 F. Supp. 538 (N.D. Cal. 1970), *rev'd. on other grounds*, 464 F.2d 178 (9th Cir. 1972). See also Ratner & Cole, *supra* note 12, at 727.

174. 429 F.2d 302 (2d Cir. 1970).

175. *Id.* at 304.

176. *Id.* at 302.

distribution of war power.<sup>177</sup> In analyzing whether the challenge presented a political question, the court distinguished the separation of powers issue from the issue of whether the war was authorized in accordance with the Constitution.

With regard to the initial issue, the court indicated that the case did not call for judicial "second guess[ing]" of a presidential decision "to commit armed forces to action."<sup>178</sup> Instead, it raised the issue of whether the courts "have the power to make the particular kind of constitutional decision involving the division of powers between legislative and executive branches."<sup>179</sup> It then rejected the government assertion that, absent a declaration of war, the scope of the President's power as commander in chief is as broad and unitary as his power over foreign affairs in general.<sup>180</sup> The court indicated that the government argument would essentially nullify the authority granted to Congress by the declaration clause of the Constitution.<sup>181</sup> The court apparently recognized that the government position would nullify any congressional role in war power decision-making whenever the President decided to involve the nation in hostilities without a declaration of war.<sup>182</sup> Concluding that the historical significance of granting Congress the power to declare war was designed to preclude unilateral executive decision-making on that subject, the court held that the executive and legislative branches shared the constitutional authority to commit the United States to war<sup>183</sup> and that the Constitution required participation by both of these branches in any such decision.

Having rejected the conclusion that the political question doctrine applied per se to any war power issue, the court then analyzed the subsequent issue of the constitutionality of the Vietnam conflict.<sup>184</sup> Finding that the Tonkin Gulf Resolution<sup>185</sup> and other implied congressional authorizations<sup>186</sup> provided sufficient evidence of congressional participation in the

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177. *Id.*

178. *Id.* at 304.

179. *Id.*

180. *Id.* (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S.304 (1936)).

181. *Id.* at 304.

182. See *supra* note 229 (discussing the inferred negative power created by the declaration clause).

183. *Berk*, 429 F.2d at 304.

184. *Id.*

185. Pub. L. No. 88-408, 78 Stat. 384 (1964).

186. "From 1964 to 1969, Congress proceeded to pass no less than twenty-four public laws supporting presidential action in Vietnam." Ratner & Cole, *supra* note 12, at 729 (citing E. KEYNES, *UNDECLARED WAR* 114 (1982)).

decision to wage war, the court concluded that the constitutional requirement of legislative support for the President was satisfied.<sup>187</sup> It then held that the narrower question of whether this support was constitutionally sufficient involved a "lack of judicially discoverable and manageable standards" and was therefore a political question.<sup>188</sup> However, the decision also indicated that presidential military decisions might fail to pass constitutional scrutiny in the absence of such a significant congressional role.<sup>189</sup> Thus, while the question of what constitutes sufficient congressional participation in the decision to wage war was considered to be a political question, ascertaining whether Congress participated at all was not.

In *Orlando v. Laird*,<sup>190</sup> two Army enlistees appealed district court denials of requests for injunctions against enforcement of orders that required them to deploy to Vietnam.<sup>191</sup> On appeal, they asserted that the Constitution required "an express and explicit congressional authorization of the Vietnam hostilities," the absence of which rendered their orders unconstitutional.<sup>192</sup> To support this argument, they asserted that "because military appropriations lacked an explicit authorization for particular hostilities, they could not, as a matter of law, be considered sufficient."<sup>193</sup>

The United States Court of Appeals for the Second Circuit denied the appeal.<sup>194</sup> Relying on *Berk*,<sup>195</sup> the court once again held that determining whether Congress had exercised its constitutional role in deciding to wage war was a justiciable issue; however, second guessing how Congress exercised that role was not.<sup>196</sup> The court then concluded that the evidence showed a significant level of joint action to "prosecute and support" military operations in Vietnam, making the orders constitutionally valid.<sup>197</sup>

The Congress and the Executive have taken mutual and joint action in the prosecution and support of military operations in Southeast Asia from the beginning of those operations. The

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187. *Berk*, 429 F.2d at 305.

188. *Id.* at 304 (quoting *Baker v. Carr*, 369 U.S. 186 (1962)).

189. *Id.*

190. 443 F.2d 1039 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971).

191. *Id.*

192. *Id.* at 1041.

193. *Id.* at 1042.

194. *Id.* at 1043.

195. 429 F.2d 302 (2d Cir. 1970).

196. *Orlando*, 443 F.2d at 1043-44.

197. *Id.* at 1042 (citing H.R. REP. NO. 90-267, at 38 (1967)).

Tonkin Gulf Resolution, enacted August 10, 1964 (repealed December 31, 1970) was passed at the request of President Johnson and, though occasioned by specific naval incidents in the Gulf of Tonkin, was expressed in broad language which clearly showed the state of mind of the Congress and its intention fully to implement and support the military actions taken by the President at that time in Southeast Asia, and as might be required in the future "to prevent further aggression." Congress has ratified the executive's initiatives by appropriating billions of dollars to carry out military operations in Southeast Asia and by extending the Military Selective Service Act with full knowledge that persons conscripted under that Act had been, and would continue to be, sent to Vietnam. Moreover, it specifically conscripted manpower to fill "the substantial induction calls necessitated by the current Vietnam buildup."<sup>198</sup>

The court then accepted the government contention that "decisions regarding the form and substance of congressional enactments authorizing hostilities are determined by highly complex considerations of diplomacy, foreign policy, and military strategy inappropriate to judicial inquiry."<sup>199</sup> Again, however, the court concluded that the Constitution did mandate some verifiable form of congressional authorization for military operations amounting to war as a prerequisite for the legality of the President's prosecution of the war.

In *Massachusetts v. Laird*,<sup>200</sup> the State of Massachusetts sought to enjoin the Secretary of Defense from ordering its inhabitants to military duty in Southeast Asia.<sup>201</sup> Like the Second Circuit, the First Circuit also concluded that the challenge presented a political question.<sup>202</sup> Unlike the Second Circuit, however, the First Circuit focused on the "textually committed to a coordinate branch" prong of the *Baker* political question test.<sup>203</sup> The First Circuit also focused on the requirement for some verifiable form of congressional concurrence or authorization for prosecution of the war.

As to the power to conduct undeclared hostilities beyond emergency defense, then, we are inclined to believe that the Con-

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198. *Orlando*, 443 F.2d at 1043-44.

199. *Id.* at 1043.

200. 451 F.2d 26 (1st Cir. 1971).

201. *Id.* at 28.

202. *See supra* notes 170-262 and accompanying text.

203. *See supra* note 32 and accompanying text.

stitution, in giving some essential powers to Congress and others to the executive, committed the matter to both branches, whose joint concord precludes the judiciary from measuring a specific executive action against any specific clause in isolation . . . . In arriving at this conclusion we are aware that while we have addressed the problem of justiciability in the light of textual commitment criterion, we have also addressed the merits of the constitutional issue.<sup>204</sup>

The court emphasized this critical congressional role with the caveat that its holding applied only to situations that involved “prolonged but undeclared hostilities, where the executive continues to act *not only in the absence of any conflicting Congressional claim of authority, but with steady Congressional support*.”<sup>205</sup> In response to the argument that congressional support short of a declaration of war was insufficient to authorize presidential execution of the war, the court noted that the Declaration Clause of the Constitution was not written to negate other possibilities and that Congress was also granted the power to grant letters of marque and reprisal.<sup>206</sup> Therefore, the court rejected the argument “that Congress has no power to support a state of belligerency beyond repelling attack and short of a declared war” and concluded that the Constitution did not prohibit congressional support for an undeclared war.<sup>207</sup>

In *Dacosta v. Laird*,<sup>208</sup> the Second Circuit again faced a constitutional challenge to the war when a draftee sought to prevent enforcement of deployment orders to Vietnam.<sup>209</sup> By the time of this challenge, Congress had repealed the Tonkin Gulf Resolution.<sup>210</sup> Emphasizing the Second Circuit’s prior holding in *Orlando* that the Tonkin Gulf Resolution served as

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204. *Massachusetts v. Laird*, 451 F.2d at 33.

205. *Id.* at 34 (emphasis added).

206. *Id.* at 33.

207. *Id.*

208. 448 F.2d 1368 (2d Cir. 1971).

209. *Id.* at 1368-69.

210. See Pub. L. No. 91-672, § 12, 84 Stat. 2055 (1971). See also DYCUS ET AL., *supra* note 28, at 140-42. “At the end of 1970, spurred by public dissent and frustrated by President Nixon’s decision to invade Cambodia, Congress voted to repeal the Gulf of Tonkin Resolution by a single sentence amending an unrelated measure.” *Id.* at 211-12.

substantial evidence of congressional authorization for the war, the plaintiff argued that the requisite support no longer existed.<sup>211</sup>

In response to this argument, the court refused to treat the repeal of the Tonkin Gulf Resolution as sufficient evidence that Congress no longer supported the war.<sup>212</sup> Instead, it found requisite evidence of support in defense appropriations and selective service authorizations.<sup>213</sup> Characterizing the repeal of the Tonkin Gulf Resolution as a means of “winding down” the war, the court held that how the President and Congress chose to bring a conflict to an end was as much a political question as how they chose to prosecute it.<sup>214</sup> Based on this asserted continued cooperative policy of the two political branches, the court dismissed the challenge.<sup>215</sup> The court indicated, however, that “[i]f the executive were now escalating the prolonged struggle instead of decreasing it, additional supporting action by the legislative branch over what is presently afforded, might well be required.”<sup>216</sup>

This “winding down” response to the plaintiff’s assertion that the *Orlando* precedent<sup>217</sup> required the court to conclude that Congress no longer supported the war soon presented an even more difficult dilemma for the court.<sup>218</sup> On 8 May 1972, President Nixon announced his decision to mine the ports of North Vietnam and to step up the bombing campaign. Responding to the breakdown of peace negotiations, he indicated that denying the enemy the capability to continue to wage war necessitated his decision.<sup>219</sup> Subsequent to this announcement, *Dacosta* once again sought an injunction to halt the war in Southeast Asia.<sup>220</sup> Armed with these new facts, and relying on the “now escalating”<sup>221</sup> language from the denial of his first challenge to the war, he asserted that the President unilaterally and unconstitutionally decided to escalate the war and that military leaders were therefore not authorized to carry out the President’s orders.<sup>222</sup>

The Second Circuit once again dismissed the action as a political question.<sup>223</sup> Unlike prior decisions, the court did not regard the case as an

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211. See *supra* notes 189-199 and accompanying text.

212. *Dacosta*, 448 F.2d at 1369.

213. *Id.* at 1369-70.

214. *Id.* at 1370.

215. *Id.* at 1368.

216. *Id.* at 1370.

217. See *supra* notes 189-199 and accompanying text.



attack on the constitutionality of the war. Instead, it framed the issue in the following terms:

We are called upon to decide the very specific question whether the Secretary of Defense, the Secretaries of the Army, Navy, and Air Force, and the Commander of American military forces in Vietnam, may implement the directive of the President of the United States, announced on May 8, 1972, ordering the mining of the ports and harbors of North Vietnam and the continuation of air and naval strikes against military targets located in that battle-scarred land. The appellant seeks a declaratory judgment that the military operations undertaken pursuant to that directive are unlawful in the absence of explicit Congressional authorization, and asks for what he terms "appropriate equitable relief."<sup>224</sup>

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218. At least two critics have asserted that the cases decided during the Vietnam conflict were the product of a judiciary consistently attempting to avoid reaching deciding the issue of the war's legality without appearing totally ineffective as a branch of government. *See Ratner & Cole, supra* note 12, at 716.

Since 1950, we have witnessed a reversal in the constitutional scheme. The war powers, clearly vested in Congress by the Framers, have come under de facto presidential control. While scholars differ as to the sources, causes, and historical details of this constitutional alteration, very few deny that the constitutional scheme has been radically frustrated.

The judiciary has neither attempted to redress nor even recognized this problem. By dismissing in the name of "judicial restraint" challenges to presidential usurpation of the war powers, courts have ignored *their* institutional role.

*Id.*

219. *See DYCUS ET AL., supra* note 28, at 215.

220. *See Dacosta v. Laird*, 471 F.2d 1146 (2d Cir., 1973).

221. *See Dacosta*, 448 F.2d at 1370.

222. *Ducosta*, 471 F.2d at 1146. This case highlighted the difficulty in trying to draw a line between the commander in chief, as the "top general," properly directing the execution of a constitutionally authorized war, and the President unconstitutionally altering the very nature of a previously authorized commitment. There is little debate over the authority of the President to direct the execution of a constitutionally authorized war. *See supra* note 12 and accompanying text. The court appears to have determined that the second half of this issue is too complex to adjudicate. *See infra* note 223 and accompanying text.

223. *Ducosta*, 471 F.2d at 1146.

Thus framed, the court focused on whether “the President’s conduct has so altered the course of hostilities in Vietnam as to make the war as it is currently pursued different from the war which we held in *Orlando* and *Dacosta* to have been constitutionally ratified and authorized.”<sup>225</sup> It then clarified the meaning of the “now escalating” language, upon which the appellant relied. According to the court, this language “implied, of course, that litigants raising such a claim had a responsibility to present to the court a manageable standard which would allow for proper judicial resolution of the issue.”<sup>226</sup> Failure to do so resulted in dismissal based on the political question doctrine, because the judiciary lacks the ability to resolve such an issue absent such standards. According to the court:

The difficulty we face in attempting to decide this case is compounded by a lack of discoverable and manageable judicial standards. Judge Dooling [who decided the case for the District Court] believed that the case could be resolved by simply inquiring whether the actions taken by the President were a foreseeable part of the continued prosecution of the war. That test, it seems to us, is superficially appealing but overly simplistic. Judges, deficient in military knowledge, lacking vital information upon which to assess the nature of battlefield decisions, and sitting thousands of miles from the field of action, cannot reasonably or appropriately determine whether a specific military operation constitutes an “escalation” of the war or is merely a new tactical approach within a continuing strategic plan.<sup>227</sup>

Although it dismissed *Dacosta*’s second challenge, the court refused to abandon the proposition that a large scale escalation of the war could require additional congressional support. Rather, it chose to place the burden on the litigant to provide standards by which a court could determine whether the action was in fact an unauthorized escalation. The court also

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224. *Id.* With the issue framed this narrowly, the court held that the “lack of judicially manageable standards” prong of the political question doctrine mandated dismissal. *Id.* at 1155.

225. *Id.* at 1154.

226. *Id.* at 1156.

227. *Id.* at 1155-56.

re-emphasized the significance of what it concluded was continued congressional support for the war.<sup>228</sup>

Having previously determined, in accordance with our duty, that the Vietnamese war has been constitutionally authorized by the mutual participation of Congress and the President, we must recognize that those two coordinate branches of government—the Executive by military action and the Congress, by not cutting off the appropriations that are the wherewithal for such action—have taken a position that it is not within our power, even if it were our wish, to alter by judicial decree.<sup>229</sup>

In 1973, the bombing of Cambodia by U.S. forces led to the final judicial challenge to the war in Southeast Asia. In *Holtzman v. Schlesinger*,<sup>230</sup> a congresswoman and several U.S. Air Force officers who were assigned to Southeast Asia sought declaratory and injunctive relief to halt these air operations.<sup>231</sup> After the President exercised his veto to terminate an effort to cut off funding for air operations over Cambodia, Congress appropriated funding in support of such operations until 15 August 1973.<sup>232</sup> The plaintiffs argued that Congress had, in effect, been forced to fund these operations and that this compromise funding process inverted the constitutional war power scheme.<sup>233</sup> In short, the President needed the support of only

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228. *Id.* at 1157.

229. *Id.* This language certainly suggests that the court in fact did resolve the ultimate issue in the case and concluded that Congress had authorized, at least by implication, the escalation ordered by the President. It reached this conclusion by focusing primarily on appropriations that supported continued hostilities.

The War Powers Resolution places into question whether such a conclusion would be valid today. See *infra* note 262. Furthermore, such an analysis can potentially be perceived as posing a danger of inverting the constitutional war power process. If Congress is vested with the power to authorize a conflict, the logical conclusion is that failure to reach a majority in favor of conflict results in non-authorization. This ostensibly requires that a bare majority of only one house of Congress be opposed to a conflict. Even a resolution to withdraw authorization for a conflict would require only a simple majority of both houses. In neither case would there be a necessity to muster a super-majority to override a veto. However, the simple majority would be insufficient to override a virtually certain presidential veto of a bill that terminates appropriations for a conflict. Therefore, while this focus on appropriations seems legitimate in the face of no other indication of congressional will (assuming that the War Powers Resolution does not impact this analysis), a resolution that opposes a conflict or a refusal to authorize it in the first place should trump such a consideration.

230. 484 F.2d 1307 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974).

231. *Holtzman v. Schlesinger*, 361 F. Supp. 553 (E.D.N.Y. 1973).

232. *Id.*

one-third plus one member of the House of Representatives to avoid an appropriations cutoff, instead of the majority of both houses that would have been needed to authorize the war from the outset.<sup>234</sup>

The district court accepted the plaintiffs' theory, granted a motion for summary judgment, and enjoined further operations based on an absence of congressional support for military operations over Cambodia.<sup>235</sup> The Second Circuit then granted the government's request for a stay of the injunction pending resolution of an appeal.<sup>236</sup> The plaintiffs sought to dissolve the stay from Justice Marshall in his capacity as a circuit justice.<sup>237</sup> Adopting the analysis used by circuit courts that previously adjudicated challenges to the war, Justice Marshall concluded that the political question doctrine did not bar a challenge to the constitutionality of the President's orders.<sup>238</sup>

Justice Marshall did not, however, dissolve the stay.<sup>239</sup> He focused on the procedural issue of whether dissolution of the stay was justified.<sup>240</sup> Because a plausible interpretation of the facts might show continued congressional support for operations in Cambodia, which would allow the government to prevail on appeal, he concluded that dissolution was inappropriate.<sup>241</sup> Justice Marshall also highlighted, however, the critical need for some congressional role in the decision to wage war: "As a matter of substantive constitutional law, it seems likely that the President may not wage war without some form of congressional approval—except, perhaps

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233. *Holtzman*, 484 F.2d at 1313.

234. *Id.* at 1313-14. Phrased alternatively, an authorization to go to war, which requires a simple majority of both houses under the Constitution, requires a super-majority of both houses not to authorize once the President unilaterally commits U.S. forces to combat operations.

235. *Holtzman*, 361 F. Supp. at 553.

236. *Holtzman*, 484 F.2d at 1308.

237. *Holtzman v. Schlesinger*, 414 U.S. 1304 (1973).

238. *Id.* at 1311. Justice Marshall wrote: "[T]here is a respectable and growing body of lower court opinion holding that Art. I, § 8, cl. 11, imposes some judicially manageable standards as to congressional authorization for war making, and that these standards are sufficient to make controversies concerning them justiciable." *Id.*

239. *Id.* at 1315. Another major consideration applied by Justice Marshall to reach the conclusion that dissolution of the stay was inappropriate was the accelerated hearing already ordered by the Second Circuit. *Id.*

240. "With the case in this posture, however, it is not for me to resolve definitively the validity of the applicants' legal claims. Rather, the only issue now ripe for decision is whether the stay ordered . . . should be vacated." *Id.* at 1308.

241. *Id.* at 1314.

in the case of pressing emergency or when the President is in the process of extricating himself from a war which Congress once authorized.”<sup>242</sup>

The plaintiffs then applied to Justice Douglas, in his capacity as a circuit justice, for the same relief that had been denied by Justice Marshall.<sup>243</sup> Justice Douglas ordered dissolution.<sup>244</sup> He noted the unusual nature of the procedure and the prior denial of the requested relief by Justice Marshall; however, he concluded that Justice Marshall’s opinion did not bind him.<sup>245</sup> He justified his re-imposition of the injunction by focusing on the potential loss of life facing the servicemen, equating the case to a capital case because of the possible deprivation of life without due process which might result from obeying an unconstitutional presidential order.<sup>246</sup> Justice Douglas also noted that the issue was justiciable and that the President did not possess unilateral constitutional authority to make war.

The question of justiciability does not seem to be substantial. In the *Prize Cases*, decided in 1863, the Court entertained a complaint involving the constitutionality of the Civil War. In my time we held that President Truman in the undeclared Korean War had no power to seize the steel mills in order to increase war production. The *Prize Cases* and the *Youngstown* case involved the seizure of property. But the Government conceded on oral argument that property is no more important than life under our Constitution . . . . Property is important, but if President Truman could not seize it in violation of the Constitution, I do not see how any President can take “life” in violation of the Constitution.<sup>247</sup>

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242. *Id.* at 1311-12.

243. *Holtzman v. Schlesinger*, 414 U.S. 1316 (1973).

244. *Id.*

245. *Id.*

246. *Id.* at 1319.

247. *Id.* at 1317.

For Justice Douglas, the constitutional grant of war declaration authority to Congress,<sup>248</sup> coupled with doubtful congressional support for the bombing of Cambodia, mandated his decision.<sup>249</sup>

The government returned to Justice Marshall the following day with a request to re-impose the stay.<sup>250</sup> Justice Marshall, noting that the Second Circuit had scheduled hearing on the appeal in four days, granted the government request.<sup>251</sup> The Second Circuit issued a decision on the government appeal on 8 August 1973.<sup>252</sup> Relying on the appropriations statute that authorized military operations in Southeast Asia through 15 August 1973 as unambiguous evidence of congressional support for the President's orders, the court ruled in favor of the government.<sup>253</sup> The court rejected the plaintiffs' argument that an appropriation that resulted from a veto-inspired compromise should not be considered as such evidence.<sup>254</sup>

The court once again held that some tangible evidence of congressional participation in the decision to wage the war satisfied the justiciable question of whether the President's orders were constitutional. Again, however, it treated the question of the constitutional propriety of the method used by Congress to support the conflict as a political question.<sup>255</sup>

Although the government prevailed in every case that challenged the constitutionality of the Vietnam War, it did so based on tangible evidence that Congress played a role in deciding to conduct the war. These cases also held that the method chosen by Congress to play this role was not an appropriate subject of judicial review.

These decisions can certainly be viewed as a judicial maneuver to avoid the difficult decision of the ultimate issue.<sup>256</sup> However, while it is

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248. "It has become popular to think the President has that power to declare war. But there is not a word in the Constitution that grants that power to him. It runs only to Congress." *Id.* at 13i8.

249. *Id.* at 1317-18.

250. *Holtzman v. Schlesinger*, 414 U.S. 1321 (1973).

251. *Id.* at 1322. In support of his decision, he indicated that he had contacted the other members of the Court, who, with the exception of Justice Douglas, agreed with his decision. Justice Douglas dissented and challenged the procedure Justice Marshall used to determine the views of other Court members. *Id.* at 1322-23.

252. *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973).

253. *Id.*

254. *Id.* at 1313-14.

255. *Id.*

true that they do suggest a hesitancy on the part of the judiciary to entertain challenges to war-malung decisions, they also indicate a judicial willingness to make an initial determination of what is required by the Constitution to render such decisions lawful. Taken collectively, these holdings are consistent with other cases involving war power issues<sup>257</sup> and the *Youngstown* separation of powers analytical template.<sup>258</sup> They illustrate the judicial view that the Constitution vests war-making power in *both* political branches, even for an undeclared war. This requires some level of congressional support for presidential prosecution of a conflict for such prosecution to be constitutionally authorized. In short, as long as the President is acting in the “twilight zone” of Justice Jackson’s analytical framework,<sup>259</sup> constitutional jurisprudence supports his decisions to wage war. However, if such a decision contradicts the express will of Congress and therefore falls within Justice Jackson’s third tier,<sup>260</sup> this same constitutional jurisprudence supports only decisions that are based on response to “emergency.”<sup>261</sup>

Based on this analysis, the risk of judicial injunction of a presidential order to execute a military operation becomes significant if an impasse exists between the President and Congress over contradictory war power positions. It is the existence of such an impasse that would remove the dispute from the “some cooperation” political question precedents.<sup>262</sup> During the buildup for the Persian Gulf War, one federal district court adjudicated a case involving the potential for such an impasse. The decision in that case provides an explicit indication of the potential resolution of such a war power impasse.

#### VIII. The Persian Gulf War

The war power situation that the Vietnam era cases suggested would fail to meet the constitutional standard for a lawful presidential order—a presidential order to commit United States armed forces into a major conflict absent any evidence of congressional authorization—became a realistic possibility in the Autumn of 1990. During this period, the United States deployed several hundred thousand troops to the Persian Gulf in response

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256. See *supra* note 218 accompanying text.

257. See *supra* notes 105-141 and accompanying text.

258. See *supra* notes 86-87 and accompanying text.

259. See *supra* note 85 and accompanying text.

260. *Id.*

261. See *supra* note 189 and accompanying text.

262. The War Powers Resolution significantly altered the issue of what constitutes sufficient congressional support for the President. *See* War Powers Resolution, Pub. L. No. 93-248, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541-1548 (1994)). In what seems to be an effort to prevent non-explicit congressional authorization to be interpreted as support for a President, as the courts consistently did through the Vietnam War era, the War Powers Resolution included two provisions to require explicit indications of congressional support for the President. Section 1541, Purposes and Policy, subsection (c) states that:

The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) *specific statutory authorization*, or (3) a national emergency created by an attack upon the United States, its territories or possessions, or its armed forces.

*Id.* § 1541(c) (emphasis added). This language indicates that, except for the President's authority to "repel sudden attack," only a declaration of war or its functional legislative equivalent may be treated as war-making authorization from Congress. This requirement for an express authorization appears again in § 1541, Congressional Action. In subsection (b), it allows an unauthorized deployment to continue beyond 60 days only when authorized by a declaration of war or specific statutory authorization. *Id.* § 1541(b).

Finally, in § 1547, Interpretation of Joint Resolution, the following language appears:

(a) Authority to introduce United States Armed Forces into hostilities or situations wherein involvement in hostilities is clearly indicated by the circumstances *shall not be inferred*—

(1) *from any provision of law (whether or not in effect before November 7, 1973), including any provision contained in any Appropriations Act, unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities or into such situations and states that it is intended to constitute specific statutory authorization within the meaning of this chapter.*

*Id.* § 1547(a)(1) (emphasis added).

If these provisions are constitutional, which is an issue *vel non*, courts would have the "manageable standard" by which to judge congressional participation in war-making decisions. Courts would then be unable to dismiss as political questions those cases that involve issues that are similar to those of the Vietnam era once "some" congressional participation has been identified. In the context of those decisions, these provisions certainly appear to be an effort to prevent just such results. However, because the constitutionality of the War Powers Resolution is far from certain, and because there is no evidence that the courts will treat these provisions as binding in future cases, this article assumes that the War Powers Resolution is not applicable.



to the Iraqi invasion of Kuwait. Labeled Operation "Desert Shield," defense of Saudi Arabia was the initial mission of this force. This defensive mission received substantial implied and express support from Congress.<sup>263</sup> On 29 November 1990, however, the United Nations Security Council approved Resolution 678, which authorized "Member States cooperating with the Government of Kuwait . . . to use all necessary means to uphold and implement" former resolutions that demanded Iraq to withdraw from Kuwait.<sup>264</sup> Then, on 8 November 1990, President Bush "announced the need for 'an adequate offensive military option' and doubled the size of the United States forces in the Gulf."<sup>265</sup> This move led Congress to "ask from what source the chief executive drew this extraordinary authority to place the nation at war without legislative approval."<sup>266</sup> The initial strong support for the administration policy of defending Saudi Arabia began to erode, and, by January 1991, Congress was debating whether to grant the President authority to conduct offensive military operations to achieve the objectives of United Nations Resolution 678.<sup>267</sup>

President Bush set the stage for a constitutional showdown of the magnitude necessary to run afoul of the Vietnam era precedents when, during a press conference on 9 January 1991, he was asked if he would go to war if Congress failed to authorize offensive operations. In response to this question, he stated: "I don't think I need it . . . Secretary Cheney expressed it very well the other day. There are a lot of differences of opinion on either side. But Saddam Hussein should be under no illusions. *I believe I have the constitutional authority—many attorneys having so*

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263. Spaid, *supra* note 12, at 1082-83. Although Congress overwhelmingly passed a joint resolution supporting the President's actions, it cautioned the President that future military decisions must be based on United States "constitutional and statutory processes." *Id.* at 1082 (quoting Susan F. Rasky, *House Democrats Caution Bush on War*, N.Y. TIMES, Dec. 5, 1990, at A-22).

264. *See* S.C. Res. 678, U.N. SCOR, 45th Sess., U.N. Doc. S/INF/46 (1990).

265. Spaid, *supra* note 12, at 1083. Up until this date, the President had asserted that the mission of the U.S. forces deployed to the Persian Gulf was defensive—to protect Saudi Arabia from further aggression by Iraq. Both houses of Congress explicitly supported this policy. However, the resolution that expressed support also indicated that "future decisions about military action would be tied to 'United States constitutional and statutory processes.'" *Id.* at 1081 (quoting Rasky, *supra* note 263, at A22).

266. Michael J. Glennon, *The Gulf War and the Constitution*, 70 FOREIGN AFF. 84, 86 (1991).

267. *See* Spaid, *supra* note 12, at 1084. The debates over the question of whether the President should be granted authority to conduct offensive military operations in the Persian Gulf were described by one scholar as follows: "The debates preceding the votes in both houses, though truncated by the eleventh-hour nature of the President's request, were among the most responsible within memory." ELY, *supra* note 9, at 50.

*advised me.*"<sup>268</sup> According to then Under Secretary of State Richard Haas, the President clearly informed his closest advisors that he intended to order United States forces to eject Iraqi forces from Kuwait, whether or not Congress authorized the use of force, even if it meant being impeached.<sup>269</sup>

President Bush never faced the clash with Congress that he was ostensibly willing to risk. On 14 January 1991, Congress voted to grant what it characterized as "specific statutory authorization" for offensive operations.<sup>270</sup> As a result, the exact source of the President's purported unilateral authority was never revealed. One argument, however, was that the authority flowed from the United States obligation to support the United Nations.<sup>271</sup> Whether status as a member of the United Nations vests the President with additional authority to commit U.S. forces into combat has never been litigated. However, there is legislation directly on point, in the form of the United Nations Participation Act (UNPA).<sup>272</sup> The impact of this law was summarized by one scholar as follows:

In passing the UNPA, Congress made certain that the use of United States military forces in any collective security system was conditioned on the establishment of Article 43 agreements "in accordance with. . . respective constitutional processes". . . . Since this is the only congressional act allowing for the specific use of United States military forces without congressional approval, the negative implication of the UNPA is that the President cannot use military force at all without congressional approval.<sup>273</sup>

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268. Glennon, *supra* note 12, at 22 (quoting *Excerpts: The Great Debate on War Powers*, NAT'L L.J., Jan. 21, 1991, at 26 [hereinafter *Excerpts*]) (emphasis added).

269. *Frontline: The Gulf War* (PBS television broadcast, Jan. 28, 1997) [hereinafter *Frontline*].

270. See Authorization for the Use of Military Force Against Iraq, Pub. L. No. 102-1, § 2(c)(1)(C)(2), 105 Stat. 3, 4 (1991).

271. The Department of Defense analysis in support of the legality of U.S. military participation in Operation Restore Hope in Somalia is a subsequent example of reliance on the United Nations Participation Act and the United States obligation to support the United Nations as such a grant of authority. See Memorandum, General Counsel, Department of Defense, to Secretary of Defense, subject: Legal Authority for Somalia Relief Operations (Dec. 5, 1992).

272. Pub. L. No. 79-264, ch. 583, 59 Stat. 619 (1945) (codified at 22 U.S.C. §§ 287-287(e) (1994)).

273. Spaid, *supra* note 12, at 1074-75 (quoting U.N. CHARTER art. 43).

Professor Turner, a prominent proponent of expansive executive war power, proffers a contrary interpretation of the UNPA. He asserts that it supports the authority of the President to act pursuant to a United Nations resolution without congressional support:

On the issue of whether the Congress should reserve a "veto" over decisions to use U.S. armed forces to carry out decisions of the Security Council, the House report quoted this language from the Senate Foreign Relations Committee's report on the United Nations Charter issued six months earlier: "[T]he committee is convinced that any reservation to the Charter, or any subsequent congressional limitation. . . , designed to provide, for example, that employment of the armed forces of the United States to be made available to the Security Council under special agreements referred to in article 43 could be authorized only after the Congress had passed on each individual case, would clearly violate the spirit of one of the most important provisions of the Charter . . . .

. . . .

The committee feels that a reservation or other congressional action such as that referred to above *would also violate the spirit of the United States Constitution under which the President has well-established powers and obligations to use our armed forces without specific approval of Congress.*"<sup>274</sup>

In a footnote, however, Professor Turner acknowledges that this quote applies specifically to Article 43 agreements and is extended to other United Nations operations by analogy only.<sup>275</sup> From a perspective of analyzing whether Congress supports a military operation that is conducted pursuant to a United Nations resolution, the distinction seems substantial. Under an Article 43 agreement, Congress would have already given explicit support for the operation by approving the Article 43 agreement to place forces under the control of the Security Council. There would be no

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274. Turner, *supra* note 3, at 959 (quoting H.R. REP. NO. 79-1383, at 4-5 (1945) (emphasis added).

275. *Id.* at 5 n.198.

such explicit evidence of support under the ad hoc hypothetical suggested by Turner.<sup>276</sup>

In the example of the Persian Gulf War, the buildup of forces by the President to prepare for offensive military operations, without first seeking congressional authorization, although pursuant to a United Nations resolution resulted in a judicial challenge by members of Congress. The resulting decision concluded that the challenge was not yet ripe. However, the court went on to suggest the probable outcome of a subsequent challenge if Congress denied authorization for offensive operations, thus satisfying the ripeness requirement.<sup>277</sup>

The case that presented this issue, *Dellums v. Bush*,<sup>278</sup> involved a challenge by fifty-four members of Congress to the President's plan to use an "offensive" option to eject Iraqi forces from Kuwait.<sup>279</sup> These members asked the U.S. District Court for the District of Columbia to enjoin the President from initiating offensive operations in the Persian Gulf without first obtaining congressional authorization.<sup>280</sup> Because Congress had yet to take an express position on the issue, Judge Harold Green dismissed the challenge as not yet ripe.<sup>281</sup> With the following language, however, he rejected all other government theories of non-justiciability: "[W]hile the Constitution grants to the political branches, and in particular to the Executive, responsibility for conducting the nation's foreign affairs, it does not follow that the judicial power is excluded from the resolution of cases merely because they may touch upon such affairs."<sup>282</sup>

In his opinion, Judge Green indicated that a deadlock between the two political branches would not only justify, but also require, judicial resolution.<sup>283</sup> Furthermore, he fired the proverbial "shot across the executive bow" when he indicated that he would probably enjoin the President from ordering execution of offensive military operations should Congress vote to deny authorization.<sup>284</sup>

Although the court rejected the political question doctrine as grounds for dismissal, this decision by Judge Green can still be reconciled with those from the Vietnam era.<sup>285</sup> The Vietnam courts abstained from adjudicating a challenge to an exercise of war power by the President based on cooperation between two coordinate branches; Judge Green abstained from adjudicating the issue based on a lack of policy conflict between the two political branches. Under either abstention rationale, a war power policy impasse between these two branches is subject to the same response — judicial resolution. Furthermore, all of these cases either explicitly assert

or implicitly suggest that Congress has the final say in the event of such an

276. History has certainly called into question the significance of this statute, particularly since the United States has never entered into an Article 43 agreement. *Id.* at 1066 (citing Mary Ellen O'Connell, *Enforcing the Prohibition on the Use of Force: The U.N.'s Response to Iraq's Invasion of Kuwait*, 15 S. ILL. U. L.J. 453, 466 (1991)). Whether this indicates that the use of U.S. forces to implement United Nations resolutions under Article 42, such as in Korea and Haiti, should be regarded as evidence of a source of unilateral presidential authority is questionable. Even if these operations were not conducted pursuant to specific statutory authorization, it does not follow that the authority of the President to commit U.S. forces flowed from the U.S. obligation to the United Nations. (It should be noted that, in *Dellums v. Bush*, the argument put forth by the government on behalf of the President's unilateral authority to conduct offensive operations in the Persian Gulf was not based on United Nations treaty obligations, but on the "President's sole power to determine when military activity constitutes 'war' for constitutional purposes," an argument rejected by the court. See *Dellums v. Bush*, 752 F. Supp. 1141 (D.D.C. 1990). See also Glennon, *supra* note 12, at 22). Instead, these uses of force can be viewed as being consistent with the holdings of those cases that look to the absence of a contrary congressional position to conclude that the President and Congress have cooperated in the war power decision to such an extent as to render the decision constitutionally valid. There is no example in United States history of an operation that was conducted under the auspices of a United Nations resolution where the President acted contrary to the express will of Congress. There is also no precedent for the conclusion that because an employment of force is not in violation of international law it is automatically constitutionally valid. According to Glennon:

[A] hortatory resolution of the Council, or one authorizing use of force but not requiring it, can have no effect on the U.S. domestic system of reallocating constitutionally assigned power; that a right exists under international law to take certain action says nothing about whether a power exists under domestic law to exercise that right. The allocation of domestic power is directed by the Constitution, not by international law. For this reason, Article 51 cannot be read to confer a power on the President to use force without congressional consent when he is asked to do so in collective self-defense by a state subject to armed attack.

Glennon, *The Constitution and Chapter VII of the United Nations Charter in Agora: The Gulf Crisis in International and Foreign Relations Law*, 85 AM. J. INT'L L. 74, 81 (1991).

This view was expressed by Schlesinger specifically regarding the Korean conflict: "[A]s for the United Nations resolutions, while they justified American military action under international law, they could not serve as a substitute for the congressional authorization required in national law by the Constitution." ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 133-34 (1973). See Jane E. Stromseth, *Authority to Initiate Hostilities: Collective Force and Constitutional Responsibility: War Powers in the Post Cold-War Era*, 50 U. MIAMI L. REV. 145 (1995).

As to this question, the steel seizure decision also seems significant for the total lack of analysis of whether the actions of the President were constitutionally justified because he was executing a military operation pursuant to a unilateral authority he derived from the United States obligation to the United Nations. See *supra* notes 158-169 and accompanying text.

impasse.<sup>286</sup> Only an exercise of exclusive power vested in the President by Article II of the Constitution could justify a different conclusion.

Critical to this analysis, therefore, is whether Article II serves as a sufficient source of constitutional authority to render a different outcome than that suggested by the courts.<sup>287</sup> Although the plain language of Article II does not support such a broad interpretation of executive war power,<sup>288</sup> the precise nature of historic presidential assertions of war power authority must be factored into this analysis. The Supreme Court has established that when determining the locus of constitutional authority, a potentially determining factor is the historical exercise of war power authority. Determining the extent of unilateral executive war power requires, in the language of the Supreme Court, analysis of whether history has "painted a gloss"<sup>289</sup> over the Constitution that would support such authority.

## IX. Is there a "Historical Gloss" of Unilateral Executive War Power?

As the prior section illustrates, many judicial decisions throughout the nation's history suggest that (with the exception of certain very limited

277. The debate over whether to grant the authorization requested was intense, and the vote in the Senate resulted in 52 in favor of the authorization and 47 against. *Frontline*, *supra* note 269.

278. 752 F. Supp. 1141 (D.D.C. 1990).

279. *Id.*

280. *Id.* The lawsuit was initiated after the buildup of U.S. forces to provide an offensive capability, but before the vote in Congress regarding granting authorization to the President to use force as he planned. *Id.*

281. *Id.* at 1144.

282. *Id.* at 1146.

283. *Id.* at 1141-42.

284. *See id.* at 1144 n.5.

285. *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974); *Dacosta v. Laird*, 471 F.2d 1146 (2d Cir. 1973); *Massachusetts v. Laird*, 451 F.2d 26 (1st Cir. 1971); *Dacosta v. Laird*, 448 F.2d 1368 (2d Cir. 1971); *Orlando v. Laird*, 443 F.2d 1039 (2d Cir. 1971), *cert. denied*, 404 U.S. 869 (1971); *Berk v. Laird*, 429 F.2d 302 (2d Cir. 1970).

286. This position is consistent with the analytical framework of *Youngstown* and *Dames & Moore*. *See supra* notes 68-104 and accompanying text.

287. This position is asserted by at least one prominent scholar. *See Turner, supra* note 3, at 920.

288. *See* U.S. CONST. art. II. *See also* *Ides, supra* note 7, at 7; *ELY, supra* note 9.

289. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring). *See also infra* note 294 and accompanying text.

emergency situations) Congress must play some role in authorizing war-making decisions and may even be empowered to control the decision to wage war. The base premise of these decisions is the theory that the constitutional distribution of war powers has remained fundamentally in tact since the nation's founding. Certainly, there has been no effort to amend the Constitution to vest enhanced authority over war-making decisions in the executive branch. However, constitutional jurisprudence also indicates how the exercise of military decision-making might clarify the nebulous textual constitutional distribution of war powers.

This history may have resulted in the establishment of a "historical gloss" over the plain language of the Constitution that favors expansive presidential war-making authority. The history that leads to this argument has been described as follows:

Madison's observation regarding the executive branch's proclivity toward war has been verified by practice under our Constitution. Despite the clear framework of congressional predominance ordained by the Constitution, primary authority over the war power has shifted from that representative body to the executive branch. The transfer of authority was not abrupt, but instead occurred through a lengthy process of evolution that picked up pace as the United States emerged in the twentieth century as a recognized world power. The shift was not inevitable; that it has taken place is, however, undeniable. During the eighteenth and nineteenth centuries, unilateral exercises of the war power by the executive branch were relatively trivial and largely inconsequential in terms of their effect upon our overall political structure. Presidents did take action to suppress piracy, the American slave trade and the like, but beyond this, deference to Congress in larger scale conflicts was the rule rather than the exception . . . notwithstanding sporadic examples of presidential war making during these formative years, as the nation entered the twentieth century, the constitutional model was basically intact, albeit somewhat bruised. . . .

The turn of the century marked a clear shift in presidential attitude . . . .

None of these [early twentieth century] Presidents claimed an inherent power to make war beyond the power to repel sudden attacks, but subtle theories of "interposition" and "intervention" were created to justify a broad range of presidential military action. . . .

Presidential war making authority was pushed a step further and elevated to a constitutional principle during the Administration of President Truman through his prosecution of the Korean War. Truman committed United States troops to that conflict without congressional authorization based on the theory that "the President, as Commander in Chief of the Armed Forces of the United States, has full control over the use thereof." Congress was seemingly out of the picture . . . .

Congressional willingness to defer to the executive branch in matters relating to war reached its nadir in 1964 with the passage of the Gulf of Tonkin Resolution.<sup>290</sup>

The "historical gloss" hypothesis is premised on the conclusion that a history of unilateral presidential war-making decisions demonstrates that the Constitution should be interpreted to support executive authority to make such unilateral decisions in the future. History is used to enlighten contemporary decision makers on the proper allocation of war power under the Constitution. Therefore, this is not an "adverse possession" type theory, whereby presidential conduct has divested the legislative branch of a power it once possessed. Instead, it is a theory of constitutional interpretation, derived from the *Youngstown* template, applicable when the situs of a governmental power is textually uncertain, as in the case of war power.

Use of history for this purpose was originally articulated by Justice Frankfurter in *Youngstown*.

To be sure, the content of the three authorities of Government is not to be derived from an abstract analysis. The areas are partly interacting, not wholly disjointed. The Constitution is a framework for Government. Therefore the way the framework has consistently operated fairly establishes that it has operated according to its true nature. Deeply embedded traditional ways of conducting the government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them. It is an inadmissible narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them. In short, a systematic, unbroken, executive practice, long pur-

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290. Ides, *supra* note 7, at 616-20 (citing S. REP. NO. 90-797, at 9-12 (1967); U.S. DEP'T OF STATE, RIGHT TO PROTECT CITIZENS IN FOREIGN COUNTRIES BY LANDING FORCES (3d rev. ed. 1933); 23 DEP'T. ST. BULL. 173 (1950)).



sued to the knowledge of Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our Government, may be treated as a gloss on "executive power" vested in the President.<sup>291</sup>

This theory of constitutional interpretation is applicable to war powers because of the consistent judicial conclusion that, under the Constitution, the power to decide to wage war is shared between the President and the Congress.<sup>292</sup> Whether use of such an interpretive theory is legitimate is a subject of scholarly debate.<sup>293</sup> Regardless of scholarly opposition to its application, however, this mechanism for analyzing the impact of his-

291. *Youngstown*, 343 U.S. at 610 (Frankfurter, J., concurring).

292. This conclusion has also been expressed in the academic community.

By repeated exercise without successful opposition, the Presidents have established their authority to send troops abroad probably beyond effective challenge, at least where Congress is silent, but the constitutional foundations and the constitutional limits of that authority remain in dispute. *Such authority no doubt resides somewhere in the government of a sovereign nation; constitutional Scripture does not explicitly grant it to Congress or deny it to the President, and it provides some text in support of his initiatives.*

LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 53 (1972) (emphasis added).

293. See Ides, *supra* note 7, at 626.

It has been argued that congressional acquiescence in the practice of executive war making has constitutionally legitimized the model of presidential predominance. . . . If this theory is correct, then it can only mean that an unconstitutional practice long endured amends the Constitution for we are not here dealing with anything that can be legitimately described as a gray area. The theory is without merit. Article V of the Constitution provides a method of amendment and so long as that method is not used, the Constitution remains unaltered regardless of any pattern of behavior undertaken by the President, the Congress or the Supreme Court. There is no doctrine of amendment by violation. Patterns of unconstitutional behavior call for one response—repudiation.

*Id.* (citation omitted).

tory on the constitutional distribution of war power enjoys judicial endorsement.<sup>294</sup>

Some scholars attack the use of historical practice to guide constitutional interpretation. They assert such practice is irrelevant on the theory that unconstitutional acts practiced over time do not validate future unconstitutional acts.<sup>295</sup> It is the interpretive value of this history, however, that rebuts this criticism, a point articulated by Professor Turner:

One might argue, particularly given the extent of the constitutional practice and the long history of congressional acquiescence, that this approach begs the question and perhaps the practice is evidence that the actions were not viewed as contrary to the constitutional scheme. Dismissing the importance of constitutional practice in the interpretative process rings of the most extreme form of "original intent" jurisprudence . . . .<sup>296</sup>

It seems that the "acquiescence" to which Professor Turner refers is analogous to the implied consent evidence relied on by the Vietnam era courts to conclude that the President was constitutionally authorized to execute the war. It is critical, however, for the purposes of analyzing the limits on presidential war power, that these two terms be distinguished. If a history of acquiescence is defined as a total abdication by Congress of any role in war power decisions, it supports a conclusion that the President is constitutionally vested with war-making authority that would survive even express congressional opposition. If, however, acquiescence is defined as the type of "implied consent" by Congress to presidential war making decisions, it supports a conclusion that Congress has not interpreted the Constitution as providing it with no role in war-making decisions, but instead as allowing Congress to choose the means that it determines are most appropriate to support presidential decisions. This later conception is exactly the conclusion reached by the Vietnam era courts. Professor Turner seems to endorse this latter view by citing in the same article the extensive evidence of congressional support for President

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294. See *supra* notes 7-16 and accompanying text.

295. See, e.g., *ELX*, *supra* note 9.

296. Turner, *supra* note 3, at 920-21.

Truman's execution of the Korean War and by praising Professor Ely for his acknowledgment that Congress fully supported the Vietnam War.<sup>297</sup>

*Dames & Moore*<sup>298</sup> represents the most striking example of how history can dictate a "locus of power" determination. The Supreme Court held that the President derived constitutional authority to suspend the claims of U.S. citizens against foreign governments from just such a "historical gloss."<sup>299</sup> In reaching this conclusion, the Court focused on two factors. First, there was a history of congressional acquiescence to such presidential claims settlements.<sup>300</sup> Second, Congress enacted "legislation closely related to the question of the President's authority in a particular case which evinces legislative intent to accord the President broad discretion [and therefore] may be considered to 'invite measures of independent presidential responsibility.'"<sup>301</sup> Such "closely related" legislation was, according to the Court, significant more for what it did not say than what it did say: "[a]t least this is so where there is no contrary indication of legislative intent and when, as here, there is a history of congressional acquiescence in conduct of the sort engaged in by the President."<sup>302</sup> Thus, the legislation indicated that the President did not act contrary to the express will of Congress; therefore, the history of acquiescence was determinative. Only after identifying a long history of such congressional acquiescence did the Court hold that the President acted pursuant to his "inherent" constitutional authority.<sup>303</sup>

Following the *Youngstown* and *Dames & Moore* approach is instructive on the issue of war power. The history of war power decisions made by Presidents relates to only that part of this "gloss" analysis that goes to identifying a "systematic, unbroken executive practice, long pursued to the knowledge of Congress."<sup>304</sup> *Dames & Moore*, however, demonstrates that to fully satisfy the test for creating such a "gloss," the practice must also have been "never before questioned" by Congress.<sup>305</sup> In short, there must

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297. See *id.* at 952-65.

298. 453 U.S. 654 (1981). See *supra* notes 61-64 and accompanying text (discussing the facts of the case). See also Stromseth, *supra* note 276, at 159 n.66.

299. *Dames & Moore*, 453 U.S. at 686-88.

300. *Id.*

301. *Id.* at 678 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).

302. *Id.*

303. *Id.* at 686-88.

304. *Youngstown*, 343 U.S. at 610-11 (Frankfurter, J., concurring).

305. *Id.*

be substantial evidence of congressional acquiescence in the exercise of war power authority by the President before a history of such presidential actions amounts to sufficient evidence to support the "unilateral" Presidential power conclusion.

Application of this two-part test, focusing on both the historical exercise of power by the President *and* congressional acquiescence, leads to the conclusion that there *is no* "historical gloss" of *unilateral* executive authority to initiate war.<sup>306</sup> No President ever initiated and waged war contrary to the express or implied will of Congress, as interpreted by the courts. Even during the height of the Vietnam War, some form of congressional support for the war always *existed*.<sup>307</sup> There has been no "systematic, unbroken, executive practice long pursued to the knowledge of Congress"<sup>308</sup> of purely unilateral war-making.

Several compilations of war-making incidents throughout history bear this out.<sup>309</sup> The analysis of this data is not undermined by post-1986 military operations. All of these operations can be classified as being based on the inherent authority of the President to protect U.S. citizens (Grenada and Panama), implicitly supported by Congress (Somalia, Haiti, and Bosnia), or explicitly authorized by Congress (the Persian Gulf and Lebanon, after Congress deemed that the operation was within the scope of the War Powers Resolution). No operation has been conducted in the face of specific congressional *opposition*.<sup>310</sup>

An example of the need to analyze the facts related to military operations carefully is provided by Professor Turner. Rejecting the position that President Truman conducted the Korean War without providing a role for Congress in the decision-making process, he notes:

[P]owerful evidence exists in the form of declassified top secret State Department documents, supported by the *Congressional Record* and the autobiographies of key congressional leaders, that President Truman placed very high priority on keeping Congress fully informed about Korea. *Furthermore, he was prepared to go before a joint session of Congress to seek a joint resolution of approval until dissuaded from involving Congress*

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306. Once again, this does not refer to the narrow exceptions based on the inherent power of the President to "repel sudden attack." See *supra* notes 110-120 and accompanying text.

307. See *supra* notes 170-262 and accompanying text.

308. See *Dames & Moore*, 453 U.S. at 686.

*more directly in the process by the advice of congressional leaders.*

309. This distinction, and the analytically flawed conclusion that results from analogizing implied congressional support to no congressional role whatsoever, was pointed out by Wormuth & Firmage:

1. Actions for which congressional authorization was claimed	7
2. Naval self-defense	1
3. Enforcement of law against piracy, no trespass	1
4. Enforcement of law against piracy, technical trespass	7
5. Landings to protect citizens before 1862	13
6. Landings to protect citizens, 1865-1967	56
7. Invasion of foreign or disputed territory, no combat	10
8. Invasion of foreign or disputed territory, combat	10
9. Other reprisals not authorized by statute	4
10. Minatory demonstrations without combat	6
11. Intervention in Panama	1
12. Protracted occupation of Caribbean states	6
13. Actions anticipating World War II	1
14. Bombing of Laos	1
15. Korean and Vietnam Wars	2
16. Miscellaneous	2

*Total* 137

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One cannot be sure, but the number of cases in which Presidents have personally made the decision, unconstitutionally, to engage in war or in acts of war probably lies between one and two dozen. And in all those cases the Presidents have made false claims of authorization, either by statute or by treaty or by international law. They have not relied on their powers as commander in chief or as chief executive.

In the case of executive wars, none of the conditions for the establishment of constitutional power by usage is present. The Constitution is not ambiguous. No contemporaneous congressional interpretation attributes a power of initiating war to the President. The early Presidents, and indeed everyone in the country until the year 1950, denied that the President possessed such power. There is no sustained body of usage to support such a claim. It can only be audacity or desperation that leads the champions of recent presidential usurpations to state that "history had legitimated the practice of presidential war-making."

FRANCIS D. WORMUTH & EDWIN B. FIRMAGE, *TO CHAIN THE DOG OF WAR* 143-44, 147, 149 (1986), reprinted in DYCUS ET AL., *supra* note 28, at 241-43. See Monaghan, *Presidential War-Making*, 50 B.U. L. REV. (Special Issue) 19, 25-31 (1970).

310. See Spaid, *supra* note 12; Ratner & Cole, *supra* note 12, at 723-26. See also Turner, *supra* note 3.

Thus, the historical record appears to refute the conventional wisdom that President Truman unilaterally, or simply following the advice of Secretary Acheson, elected to ignore the Congress on Korea. On the contrary, keeping Congress informed was a priority objective from the start . . . .<sup>311</sup>

In reaching this conclusion, it is critical to distinguish between an absence of specific congressional authorization and congressional opposition to a presidential war power decision. Federal courts have recognized the significance of this distinction on numerous occasions. This significance is that it does not indicate a long-standing practice of unilateral war-making by Presidents; to the contrary, *it indicates a long-standing practice of cooperative war-making decisions that were initiated by the President but supported by the express or implied concurrence of Congress.*<sup>312</sup>

Analysis of congressional efforts to play an active role in war power decisions provides evidence to support this conclusion. These efforts fall into three primary categories: (1) legislative efforts to limit presidential war power discretion; (2) specific authorizations of certain military operations; and (3) fiscal controls related to military operations.

In the category of efforts to limit the President's discretion, the most significant action by Congress was the passage of the War Powers Resolution<sup>313</sup> The significance of the War Powers Resolution for the purposes of a separation of powers analysis is independent from its efficacy, or even its

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311. Turner, *supra* note 3, at 950,956 (citing ELY, *supra* note 9, at 50, 53, 151) (emphasis added). The vote to extend the draft immediately after President Truman informed key congressional leaders of his decision to support South Korea provides even more compelling support for the conclusion that the actions of Congress demonstrated, in accordance with the analysis applied in the Vietnam era cases, sufficient evidence of implicit support for the war. *Id.* at 952 n. 179.

312. See *supra* note 308 and accompanying text. The significance of this conclusion transcends the rejection of unilateral presidential war power. It creates, in the opinion of this author, the most significant constitutional impediment to the validity of the War Powers Resolution. See *infra* note 340 and accompanying text. This conclusion is supported by analysis of the congressional role related to recent military operations, such as Operation Restore Hope in Somalia, Operation Uphold Democracy in Haiti, and Operation Joint Endeavor in Bosnia. In all three cases, although the President took the initiative by involving the United States in the operation, Congress debated the propriety of United States involvement and ultimately provided both fiscal and joint resolution support. See Stromseth, *supra* note 276.

313. Pub. L. No. 93-248, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541-1548 (1994)).

constitutionality.<sup>314</sup> Whether the War Powers Resolution has worked, or is even constitutional, in no way diminishes its immense value for such analysis, for it serves as an express indication that Congress specifically rejected what it viewed as a dangerous exercise of unilateral executive war power.

Recent legislative attempts to limit presidential authority to commit U.S. armed forces to international collective security operations further support the conclusion that Congress opposes an interpretation of the Constitution that eliminates its role in war power decisions. These efforts began in 1994 and share the common goal of limiting the authority of the President to place U.S. armed forces under the command of foreign officers during United Nations operations. They include the Nickles-Cochran amendments to the Department of Defense Appropriations Act of 1994,<sup>315</sup> the Peace Powers Act of 1994,<sup>316</sup> the Peace Powers Act of 1995,<sup>317</sup> the

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314. From the very time of the passage of the War Powers Resolution, these issues have spawned tremendous debate. *See* Richard Nixon, *Veto of the War Powers Resolution*, 5 PUB. PAPERS 893 (1973). *See also* Turner, *supra* note 12; Ratner & Cole, *supra* note 12; Zablocki, *supra* note 12; Ides, *supra* note 7; Glennon, *supra* note 12; Spaid, *supra* note 12; Rolph, *supra* note 12; Ford, *supra* note 12; Rushkoff, *supra* note 12. Future success of recent efforts to repeal the War Powers Resolution may moot these questions. *See* The Peace Powers Act of 1995, S. 5, 104th Cong. (1995) (including a provision specifically repealing the War Powers Resolution, but mandating new consultation and reporting requirements).

315. H.R. 3116, 103d Cong. § 8137A (1993) (prohibiting the use of U.S. funds to support U.S. combat forces when such forces were under "the command, operational control, or tactical control of foreign officers").

316. 140 CONG. REC. S182-83 (1994) (imposing barriers to providing U.S. armed forces as participants in United Nations peacekeeping operations).

317. S.5, 104th Cong. (1995) (repealing the War Powers Resolution but re-imposing equivalent consultation and reporting requirements, limiting the ability of the President to place U.S. armed forces under foreign command during peacekeeping operations, imposing a requirement on the President to submit a memorandum to the Congress addressing the constitutionality of any peacekeeping operation).

National Security Revitalization Act,<sup>318</sup> and the United States Armed Forces Protection Act of 1996.<sup>319</sup>

While none of these provisions became law, primarily because of opposition from the President (and, in several instances, presidential veto), they all serve as significant evidence that Congress clearly rejects any interpretation of the Constitution that eviscerates its role in war power decisions. What is especially significant about the trend reflected by these efforts is the concern over the changing nature of military operations. Unlike the period following the Vietnam war, Congress is no longer concerned with preserving its role only regarding "hostilities." These legislative initiatives indicate that in the view of Congress, even "operations other than war" are the subject of shared, not unilateral, power. This only reinforces the conclusion that Congress views itself as a key constitutional player in any war power decision that involves the potential for actual combat operations.

The second category of congressional efforts to limit unilateral presidential war power are specific authorizations of certain military operations. The most significant of these are the Gulf of Tonkin Resolution<sup>320</sup> and the authorization to use force in the Persian Gulf.<sup>321</sup> Again, for purposes of this analysis, whether the Presidents who prosecuted the hostilities authorized by these congressional actions would have done so without authorization is not significant.<sup>322</sup> Instead, the significance is that they reflect the congressional view of how the constitutional war power process

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318. H.R. 7, 104th Cong. (1995) (imposing restrictions on the President's authority to place U.S. armed forces under foreign command during United Nations peacekeeping missions and imposing a requirement on the President to submit a memorandum to the Congress addressing the constitutionality of any peacekeeping operation).

319. H.R. 3308, 104th Cong. (1996) (imposing a requirement that the President report to Congress the placing of U.S. armed forces under foreign command during peacekeeping operations). *See* Major Richard Watson, Recent Congressional Attempts to Limit the Placement of United States Forces from Serving Under Foreign Command (Dec. 1996) (unpublished manuscript, copy on file with author).

320. Pub. L. No. 91-672, § 12, 84 Stat. 2055 (1971).

321. Authorization for the Use of Military Force Against Iraq, Pub. L. No. 102-1, § 2(c)(1)(C)(2), 105 Stat. 3, 4 (1991).

322. Both President Johnson and President Bush specifically indicated that they believed that these authorizations were not constitutionally required to justify their prosecuting the respective conflicts. *See* Glennon, *supra* note 12, at 22 (quoting *Excerpts, supra* note 268, at 26); Ratner & Cole, *supra* note 12, at 729.



works. In both cases, Congress reacted to a perceived constitutional necessity to authorize hostilities.

The Persian Gulf authorization process has been characterized as being "among the most responsible within memory."<sup>323</sup> By its own language, the authorization invoked the concept of congressional constitutional war power responsibility as established by the War Powers Resolution.<sup>324</sup> This authorization and the process leading to it, is compelling evidence of a lack of congressional acquiescence to unilateral presidential war power, even under the United Nations collective security system.

Other examples of congressional efforts to assert control over war power policies initiated by the President include Lebanon and Somalia.<sup>325</sup> These two examples support the conclusion that, although Congress may be content to support by implication presidential war power decisions that are relatively popular, such support should not be equated to an abdication of the prerogative to reject unpopular policies affirmatively.

The third category of congressional efforts to limit presidential war power takes the form of fiscal controls. The process of fiscal authorization often involves specific limitations on the use of appropriated funds by the Department of Defense. The Purpose Statute<sup>326</sup> establishes prohibitions on the use of appropriated funds for anything other than the congressionally authorized purpose. Since World War II, Congress has resorted to this mechanism as a means of limiting presidential foreign policy decisions at an increasing rate.<sup>327</sup> The two most significant efforts by Congress to use appropriations to control presidential war power policy were the appropriation limitations that were designed to bring an end to the Vietnam War<sup>328</sup> and the Boland Amendments, which were intended to prohibit United States involvement in Central America in the early 1980's due to a fear that such involvement would draw the nation into a conflict.<sup>329</sup> More recent examples involve the attempted use of appropriations to impose strict lim-

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323. ELY, *supra* note 9, at 50.

324. See Pub. L. No. 102-1, § 2(c)(1)(C)(2), 105 Stat. 3, 4 (1991).

325. See *supra* note 16.

326. 31 U.S.C. § 1301(a) (1994).

327. See Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343 (1988).

328. See *supra* notes 170-262 and accompanying text.

329. *Id.*

itations on the nature of the command structure and personnel commitments in support of United Nations operations.<sup>330</sup>

These efforts further demonstrate that Congress considers its role in war power decisions to be constitutionally significant. Even assuming that there has been a "systematic, unbroken executive practice, long pursued to the knowledge of Congress,"<sup>331</sup> these efforts to ensure participation in war power decisions contradict the idea that Congress has "never before questioned"<sup>332</sup> assertions of unilateral executive war power. Therefore, based on the *Dames & Moore*<sup>333</sup> model, the conclusion that a "gloss of history" exists to support broad unilateral presidential war power is unjustified.

This conclusion, therefore, compels the conclusion that the President's Article II powers do not enable him constitutionally to ignore the express congressional opposition to a decision to wage war. War power jurisprudence suggests that the President is not vested with constitutional authority to support an action contrary to the express will of Congress. Based on this same jurisprudence (especially the *Youngstown* analytical model), however, as long as some plausible evidence of congressional support for the President exists, thereby placing the decision in the "twilight zone" of the *Youngstown*<sup>334</sup> template, presidential war power decisions should be considered to be constitutional.

For purposes of this analysis, it seems to matter little what type of operation is involved, as long as it cannot be considered routine training or maneuvers or within the President's inherent power to respond to emergency threats to national security. This is because the critical factor in determining the constitutionality of the presidential directive is not what type of operation is involved, or even the size of such an operation, but how Congress reacts to the operation. Explicit congressional opposition seems no less devastating to a claim of presidential authority for a small scale operation than for a large scale operation. Nor does the enabling effect of congressional support of an operation seem to depend on the scale of that operation. This view was expressed by Ratner and Cole as follows: "[P]resumably, the President, under his Commander-in-Chief powers can direct the armed forces in any manner he wishes as long as the use is 'short

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330. See *supra* notes 313-329 and accompanying text.

331. *Id.*

332. *Youngstown Sheet & Tube Co.*, 343 U.S. 579, 610-11 (1952).

333. 453 U.S. 654 (1981). For a discussion of the facts of this case, see *supra* notes 61-64 and accompanying text.

334. *Youngstown*, 343 U.S. 579.

of war.”<sup>335</sup> They go on, however, to acknowledge the difficulty in defining the term “short of war.”<sup>336</sup> Professor Moore, a distinguished national security scholar, suggests that the constitutional role of Congress should be triggered “in all cases where regular combat units are committed to sustained hostilities.”<sup>337</sup> Recent congressional efforts to assert a role in decision-making involving United Nations peace operations suggest that Congress does not accept such a “sustained hostility” formula and is once again more concerned with the “likelihood of hostilities” approach that is reflected in the War Powers Resolution.<sup>338</sup> None of these interpretations, however, make the size of the committed force the key factor for congressional authorization or opposition to an operation.

#### IX. What the Does History Support?

The conclusion that results from analyzing this body of law is two-fold. First, with the exception of actions based on emergency power or the formal process of declaring war, war powers under the United States Constitution are vested exclusively in neither the executive nor legislative branch; these powers are shared between these branches. The significance of embracing the shared nature of war power is articulated by Professor Turner as follows:

To begin with, each branch should recognize that the other has a fully legitimate role to play and that no policy will succeed in the long run without the support of both branches. This is certainly true when the policy in question might involve a commitment of armed forces to hostilities. Taylor Revely was certainly right when, in his recent book, *War Powers of the President and Congress*, he observed that “*the Constitution does impose one iron demand on the President and Congress: that they cooperate if any sustained venture for war or peace is to succeed.*” It hardly needs to be observed that, as a practical matter, Congress—despite its powers to declare war (subject to a presidential veto)—cannot effectively engage United States military

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335. Ratner & Cole, *supra* note 12, at 773.

336. *Id.*

337. *Congress, the President, and the War Powers: Hearings Before the Subcomm. on Nat'l. Security & Scientific Developments of the House Comm. on Foreign Affairs*, 91st Cong. 124, 126-27 (1970) (statement of John Norton Moore, Professor of Law, University of Virginia School of Law).

338. See Stromseth, *supra* note 276.

forces in hostilities without the cooperation of the Commander-in-Chief . . . . Given the Vietnam experience, it should be even less necessary to emphasize the necessity of congressional cooperation in formulating policies involving the use of military force . . . .

The proper congressional role in national security matters should be that of a full partner in the formulation of general principles and policies, rather than that of a micro-manager or second-guesser of the President's execution of those policies. Certainly the initiation of significant offensive hostilities is such a policy decision, which under our constitutional system of government should not be made without the approval of Congress. But more detailed questions of how many and which forces to use, and how best to employ them, are beyond both the expertise and the constitutional jurisdiction of the legislative branch.<sup>339</sup>

Second, the history of war-making decisions in the United States demonstrates that, so long as the actions of Congress reasonably suggest support for the President, the President may treat such support, even if implied, as authority to execute such decisions. This practice of relying on "implied consent," which was so significant for the Vietnam era decisions, is consistent with a broad view of executive war powers; yet, it plants the foundation for such power not in a theory of unilateral presidential war power, but in the combined authority of both political branches, as executed by the President.

Ironically, it is this practice of presidential reliance on the implicit support of the Congress and not unilateral presidential war making, that is so "long standing" that it may be considered to represent the proper constitutional process for making war power decisions. It appears reasonable to conclude that this practice of executive reliance on the implied support of the legislature comes much closer to satisfying the "historical gloss" test than the theory that the executive is now vested with broad unilateral constitutional authority to wage war.

This distinction is constitutionally critical. In the first instance, the power of the executive to commit the nation to war is derived not from a unilateral source of constitutional authority, but from the joint power of both political branches. This necessarily implies that Congress retains the discretion not to support any given executive war power decision and that

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339. Turner, *supra* note 12, at 691-96 (emphasis added).

Congress can bind the executive with that non-support. In the second instance, Congress is divested of any role in war power decisions, because the President derives authority exclusively from Article II. This necessarily infers that Congress has no discretion to “veto” a war power decision, which contradicts every judicial decision analyzed in this article.

If this “implied consent” process of war power decision-making meets the standard of “historical gloss,” it represents the most significant constitutional impediment to the validity of the War Powers Resolution.<sup>340</sup> As demonstrated, and as held by federal courts, the nation’s history of war power decisions may have established a “gloss” on the Constitution. This “gloss” supports the interpretation that the Constitution vests the President with authority to commit U.S. armed forces to combat operations based on the implied support of Congress. If this is so, § 1547(a) of the War Powers Resolution is in direct conflict with this constitutional process. According to this section:

(a) Authority to introduce United States Armed Forces into hostilities or situations wherein involvement in hostilities is clearly indicated by the circumstances *shall not be inferred*—

(1) *from any provision of law (whether or not in effect before November 7, 1973), including any provision contained in any Appropriations Act, unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities or into such situations and states that it is intended to constitute specific statutory authorization within the meaning of this chapter . . .*<sup>341</sup>

This section of the War Powers Resolution specifically prohibits the President from treating other congressional actions as implicit support for a proposed or ongoing military operation. If the *Dames & Moore* standard for establishing a “historical gloss” on the Constitution is satisfied with regard to the theory that the constitutionally mandated role for Congress in war power decisions need not amount to explicit authorization, the President and his subordinate officers should be entitled to rely on such implicit support to conclude that a proposed or ongoing operation is lawful. While Congress may choose to impose more stringent requirements on itself, such requirements seem invalid if they contradict, to the detriment of the

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340. Pub. L. No. 93-248, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541-1548 (1994)).

341. *Id.* (emphasis added).

executive branch, the constitutional scheme that has emerged through history.

## X. Conclusion:

The courts have shown that whether the President may lawfully send United States armed forces into combat is a justiciable question of constitutional interpretation. Although unusual in its nature, such a question may, under the proper circumstances, obligate the courts to ensure that the basic constitutional process of taking the nation to war is not transgressed in the name of national security.<sup>342</sup> The importance of ensuring that such a subversion never occurs was best stated by the Supreme Court:

Implicit in the term "national defense" is the notion of defending those values and ideals which set this nation apart. For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in our Constitution . . . . It would indeed be ironic if, in the name of national defense, we would sanction the subversion of . . . those liberties which make the defense of the nation worthwhile.<sup>343</sup>

The role of the courts in resolving such a conflict is highlighted by a careful analysis of the limitations on the remedies that are available to Congress to respond to such a crisis. The experience of the Persian Gulf War exemplifies the risks involved when the two political branches stake out differing positions with regard to a war power issue.<sup>344</sup> Judicial reso-

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342. The narrow majority in the Senate in favor of war authorization for the Persian Gulf War demonstrates the reality of congressional rejection of a presidential war policy. The comments of President Bush to the effect that he intended to take action regardless of whether Congress supported that action demonstrates the reality that a President might act contrary to the explicit will of Congress. *See supra* note 217 and accompanying text. In such a crisis, only the courts possess the power to impose a remedy that is consistent with the constitutional scheme of war power distribution. While it is true that Congress retains the power to take other extraordinary measures in response to presidential disregard of a refusal to authorize war—specifically a cut-off of funding or even impeachment—presuming the constitutionality of a presidential action until such a remedy is imposed contradicts the balance of war power established by the Constitution. In the case of a funding cut-off, the President would certainly exercise his veto power, thereby requiring a two-thirds majority of both houses for an override. Impeachment would require the same two-thirds majority in the House of Representatives. This means that a super majority would be needed to implement the rejection of a war authorization, which requires a simple majority of only one house of Congress. In short, if a simple majority of both houses is required to authorize war, why should a super majority be needed to refuse to authorize a war?

343. *United States v. Robel*, 389 U.S. 258, 264 (1968).

lution of the issue would preserve the constitutional scheme of authority. If the court determined that the will of Congress prevailed, an injunction would obviate the need for any extraordinary remedy by Congress, with the accompanying super majority. If, however, the court determined that the President's authority trumped the will of Congress, only a super majority vote by Congress to restrain the President should be permitted to prevail. That only the courts possess the ability to impose a remedy that is consistent with the Constitution seemed apparent to Judge Green when, in *Dellums v. Bush*, he wrote:

While the Constitution itself speaks only of the congressional power to declare war, it is silent on the issue of the effect of a congressional vote that war not be initiated. However, if the War Clause is to have its normal meaning, it excludes from the power to declare war all branches other than the Congress. *It also follows that if the Congress decides that United States forces should not be employed in foreign hostilities, and if the Executive does not of its own volition abandon participation in such hostilities, action by the courts would appear to be the only available means to break the deadlock in favor of the constitutional provision.*<sup>344</sup>

Whether a war power controversy between the President and Congress ever requires judicial resolution is unlikely. The decisions analyzed in this article suggest how the judicial branch might resolve such a case. These decisions, however, and most importantly the analytical model they establish and validate, hold greater significance for those who execute war power decisions. The decisions provide a solid legal foundation for the powerful presumption of legality traditionally accorded presidential orders. They also, however, validate the tradition of fidelity to constitutional authority by making the source of this presumption not the unilateral power of the President, but the cumulative power of our national government derived from the cooperative decisions of both the President and Congress.

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344. See *supra* notes 227-238 and accompanying text.

345. *Dellums v. Bush*, 752 F. Supp. 1141, 1144 n.5 (D.D.C. 1990).

## THE NIGHTINGALE'S SONG'

REVIEWED BY MAJOR MICHAEL J. BENJAMIN<sup>2</sup>

With a journalist's terse prose and a novelist's sense of intrigue, Robert Timberg's *The Nightingale's Song* reveals the stories of five men—all of them graduates of the United States Naval Academy, former military officers, Vietnam War veterans, and American political notables. Timberg, a seasoned newspaper reporter,<sup>3</sup> scrutinizes the lives of John Poindexter, John McCain, Robert McFarlane, James Webb, and Oliver North. Thousands of hours of personal interviews allow Timberg, also a Naval Academy graduate and Vietnam veteran, to engage the reader with anecdotes and quotations that capture the essence of each protagonist. Timberg deftly weaves personal psychological portraits with expositions on foreign policy. Blending biography, psychology, history, politics, foreign affairs, and military art, *The Nightingale's Song* draws the reader into the lives of these five men whose stories “illuminate a generation or a portion of a generation—those who went [to Vietnam].”<sup>4</sup> In all, *The Nightingale's Song* is fast-moving, informative, and incisive.

*The Nightingale's Song* also provides sharp insights about military leadership in America in the twentieth century. Although Timberg never intended *Nightingale* to be a management manual, the work has much to offer military officers and other students of leadership. Timberg exposes the personal traits and values that define military leaders. He uncovers common characteristics, documents diversity, and highlights three unambiguously positive traits: competence, caring, and courage. The author also raises leadership issues which bedevil military officers: when to defer to authority and when to refuse, and when to be loyal to a person and when to be loyal to a principle.

From his observations of character traits, Timberg develops a model to explain his subjects' actions and motivations. Ultimately, he tries to

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1. ROBERT TIMBERG, *THE NIGHTINGALE'S SONG* (1995).

2. Judge Advocate General's Corps, United States Army. Written while assigned as a student in the 46th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

3. Timberg graduated from the United States Naval Academy in 1964. He served as a Marine in South Vietnam from March 1966 to February 1967. He has been a newspaper reporter since 1973. TIMBERG, *supra* note 1, at 544.

4. *Id.* at 15.



explain how three of these men became involved in the Iran-Contra scandal. He suggests that three interrelated concepts account for Iran-Contra: deference to authority, loyalty to Ronald Reagan, and a Vietnam “filter” through which each character views the world. Timberg’s behavior models are thought-provoking but ultimately unpersuasive.

*The Nightingale’s Song* astutely discusses those qualities that make leaders great and those that bring leaders down—and often they are the same qualities. Timberg’s biographies chronicle the protagonists’ strengths and flaws, their characters and personalities. Each man possesses magnificent qualities and loathsome foibles. The characters gain the reader’s sympathy, spark ire, ignite curiosity, and, at times, inspire awe and incredulity.

Timberg looks at leadership traits at several levels, and he masterfully reveals the diverse personality types that succeed in the military. In this regard, no two persons differ more strikingly than Poindexter and McCain, both 1968 Academy graduates.

The two Johns had little in common beyond their first names, McCain rowdy, raunchy, a classic underachiever ambivalent about his presence at Annapolis; Poindexter cool, contained, a young man at the top of his game who knew from the start that he belonged at the Academy . . . . There was one important similarity. Both McCain and Poindexter were leaders in the class, the former in a manic, intuitive highly idiosyncratic way, the latter in a cerebral, understated manner that was no less forceful in its subtlety.<sup>5</sup>

Timberg fully develops the other subjects as well. McFarlane is “a man of uncommon decency,”<sup>6</sup> but profoundly vulnerable and troubled. Webb is principled, if somewhat erratic. North is manipulative and opportunistic, but always gets the mission accomplished. Knowing that all five succeeded in the military demonstrates that officers need not fit into a tra-

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5. *Id.* at 31.

6. *Id.* at 110.

ditional mold. Timberg helps to dispel any myth of a monolithic “military type.”

While Timberg notes personality differences, he also highlights three qualities common to the protagonists that characterize successful military leaders — technical competence, care for troops, and courage.

A prerequisite to effective leadership is technical competence. Timberg captures this in his description of the military prowess of James Webb as a platoon leader in Vietnam:

His military skills resulted from more than books and maps. Like an athlete, he relied on his instincts. He knew the school solution for any situation, and usually he employed it, but he also knew when to throw the book out the window. He came to think of his mind as a computer programmed for war, sorting out the chaos of the battlefield to provide him with a continuously updated readout of rapidly changing combat conditions.<sup>7</sup>

In a different milieu, *Nightingale* extols the skillfulness of John Poin-dexter at sea. “Nothing seemed to catch him by surprise because . . . he had thought through every possible eventuality, worked out the responses, and stored them away in his mind until he needed them.”<sup>8</sup>

Beyond competence, great leaders respect and care for their subordinates. Timberg’s subjects are no exceptions.

McFarlane did not insulate himself from their [his men’s] troubles . . . . He tutored troops in algebra and other subjects so they could pass high school equivalency tests, counseled men on their drinking and marital problems. His efforts were more than exercises in leadership. He was trying to live up to the belief, spawned in childhood and reinforced at Annapolis, that he had an obligation to help others, whatever their station.<sup>9</sup>

Both Webb and North, as Vietnam platoon leaders, devoted themselves to the personal and professional problems of their troops. Even as secretary of the Navy, Webb never forgot about sailors. During Webb’s

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7. *Id.* at 156.

8. *Id.* at 170.

9. *Id.* at 110.

tenure, budget cuts threatened to reduce the number of Navy ships. Webb realized that “[f]ewer ships meant longer sea tours, which stood to brutalize sailors and their families, a throwback to the seventies when the hollow joke among younger officers was, make commander and get your divorce.”<sup>10</sup> Webb ultimately resigned over the issue.

A work about warriors must discuss physical courage. The lives of Timberg’s subjects provide ample examples. Webb threw himself between a comrade and a live Vietnamese grenade, “sustaining serious fragmentation wounds that left him with a limp.”<sup>11</sup> North “repeatedly expos[ed] himself to hostile fire”<sup>12</sup> and more than once refused to report his own injuries for fear he would be taken out of combat. The most awe-inspiring passages recount John McCain’s valiant defiance as a prisoner of war. Twice the Vietnamese offered to let McCain go home. Twice he refused, basing his decision on the “Code of Conduct that said that prisoners could accept release only in order of capture.”<sup>13</sup> One refusal led to particularly abusive treatment:

[T]he guards . . . drove fists and knees and boots into McCain. Amid laughter and muttered oaths, he was slammed from one guard to another, bounced from wall to wall, knocked down, kicked, dragged to his feet, knocked back down, punched again and again in the face. When the beating was over, he lay on the floor, bloody, arms and legs throbbing, ribs cracked, several teeth broken off at the gumline.<sup>14</sup>

In addition to these positive qualities, Timberg addresses two ambiguous leadership issues that military officers frequently face. One of the recurring dilemmas in *Nightingale* is the tension between obedience to orders and the need to question or ultimately to disobey orders. The protagonists wrestle with the choice of deferring to authority or defying it, of expressing independent thought or keeping quiet. Timberg recognizes the need for discipline in the military and the great presumption that orders

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10. *Id.* at 407.

11. *Id.* at 158.

12. *Id.* at 144.

13. *Id.* at 133.

14. *Id.* at 135.

should be obeyed. He approvingly quoted Captain Paul Goodwin, one of the few officers who was able to control the volatile Oliver North:

He wasted no time in molding Kilo Company to his personal specifications. I want you to shave, he told his lieutenants. I want you to have haircuts. Not because we're going to make you pretty, but because to me personal appearance is an extension of discipline . . . . It doesn't have to make sense, just do it. I want you to get used to doing what I say, when I say it, just because I say it. One day it's going to save your ass. This is not a debating club. I'm in charge and you execute my orders.<sup>15</sup>

Timberg, however, takes a dim view of slavish obedience. Oliver North's peers criticize him for "pandering to his bosses, telling them what they wanted to hear."<sup>16</sup> Timberg respected the ability to question authority, even in a wartime scenario. In Vietnam, Webb received an order to take a defensive position which would have put his troops in undue peril. Webb refused and took up an alternate position. The platoon accomplished the mission, taking no casualties. "Webb later explained that challenging superiors had value even when it did not cause them to change course: 'To me it was like a safety valve. I wanted to make sure these people were thinking before they sent us off to do something weird.'"<sup>17</sup>

Finally, Timberg recognizes an ironic process that affects some officers. The longer an officer stays in the military, the more accustomed to deferring to the system the officer becomes; yet, as that officer becomes more and more senior, the need to question or perhaps to refuse orders gains importance. In 1983, President Reagan dispatched McFarlane, then the Middle East envoy, to the Middle East to broker a peace agreement in Lebanon. The initiative involved the deployment of U.S. Marines. From the start, McFarlane knew that the mission was doomed to fail. The initiative resulted in the bombing deaths of over 200 Marines. Timberg suggests that had McFarlane strenuously told President Reagan about the dangers and futility of the mission, perhaps the tragedy could have been averted.

But even McFarlane, by then more foreign policy intellectual than soldier, was not immune to the teachings of Annapolis and the Marine Corps. And in that theology, and it is little short of

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15. *Id.* at 142-43.

16. *Id.* at 274.

17. *Id.* at 159.

that, it is unheard of to say to your superior, in this case the President of the United States, Sir, you know that thing you asked me to do? Well, I can't do it. Forget that it may be impossible, genuinely impossible; it is equally impossible for a man like McFarlane—or North or Webb or McCain or Poindexter—to say, Mr. President, I couldn't [complete the mission].<sup>18</sup>

Ultimately, Timberg blames unthinking obedience to superiors and overzealous dedication to mission for North's, McFarlane's, and Poindexter's Iran-Contra involvement. Timberg pointedly cites *Reef Points*.<sup>19</sup>

“THE ORDER: Juniors are required to obey lawful orders of seniors smartly and without question. An expressed wish or request of a senior to a junior is tantamount to an order if the request or wish is lawful”. . . . As the scandal unfolded, it became clear that the Academy training that had helped propel North, McFarlane, and Poindexter into the White House had played a powerful role in landing them in the dock. At Annapolis and throughout their military careers, they had been ingrained with the dictum that the wish of a superior was their command. Somewhere along the line, though, probably at the White House, a venue that has turned lesser men to fools, their common sense deserted them. They knew there were times when a subordinate must say no to a superior, but as the Iran-Contra affair makes clear, their threshold was appallingly high.<sup>20</sup>

Academy training, however, did not quash either Webb's or McCain's ability to say no. Webb, as secretary of the Navy, drew a line in the sand—the Navy needs 600 ships. Despite pressure from the secretaries of defense and state, Webb remained obstinate. Ultimately, he resigned rather than concede.

Officers have a duty to obey *lawful* orders. At the same time, quality officers expect their subordinate officers to provide independent and candid advice. The professional officer questions unwise orders, suggests alternatives, and, as a last resort, disobeys an unlawful order. Timberg offers no magic formula. Goodwin was correct in demanding absolute

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18. *Id.* at 344.

19. *Reef Points: The Annual Handbook of the Brigade of Midshipmen* is a “pocket-sized handbook” that is the “plebe’s bible. It contained nearly three hundred pages of naval lore that new midshipmen were required to master.” *Id.* at 24.

20. *Id.* at 415-16.

obedience from his subordinate lieutenants in Vietnam, but Webb was also right in questioning foolish orders. North, Poindexter, and McFarlane were wrong to support the Contras, even if the President of the United States approved their actions.

An issue related to obedience is loyalty. Loyalty to subordinates, peers, and superiors is an admirable quality. Frequently, however, loyalty to superiors conflicts with adherence to moral or ethical principles. Personal bonds of loyalty merit a high premium in the military. The United States Naval Academy captures the essence of this principle while simultaneously defining one of its clearest limits: “‘Never bilge a classmate’ may be the most enduring of the Academy’s unwritten rules, though it didn’t apply to matters of honor. In other words, you were neither expected nor permitted to affirm a classmate’s lie or to cover up his cheating or stealing.”<sup>21</sup>

Displays of loyalty abound in *The Nightingale’s Song*. The author quotes Poindexter as saying, “Beyond loyalty to the country, which I put at the top, I’m loyal to who it is I’m working for. . . . And if I can’t be loyal to them, I shouldn’t be **there**.”<sup>22</sup> North, having returned to the United States from Vietnam, learned that the Marine Corps was prosecuting a former member of his platoon in Vietnam, Randy Herrod. Herrod had twice saved North’s life. North paid his own way back to Vietnam, “aware that his efforts were not likely to endear him to his **superiors**.”<sup>23</sup> North not only served as a character witness, he also assisted Herrod’s defense team. The panel acquitted **Herrod**.<sup>24</sup>

Loyalty and principle collided during North’s campaign for governor of Virginia. Poindexter remained loyal to North and campaigned on his behalf. Webb, reluctant to speak out against his former classmate, remained silent for many months. However, when North falsely impugned his opponent’s, Chuck Robb’s, Marine record, Webb could not keep silent:

Few strictures hold as much sway over Annapolis men as the unwritten rule from Academy days: never bilge a classmate. [But] North crossed the line . . . [Webb and six others] took turns accusing North of habitual lying and sully[ing] his oath of

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21. *Id.* at 26.

22. *Id.* at 372.

23. *Id.* at 188-92.

24. *Id.*

office by misleading Congress . . . Webb then spoke of the Brigade of Midshipmen . . . “What message are we sending them by this sort of equivalence? That you don’t lie, cheat, or steal, or tolerate among you anyone who does—unless you need to gain control of the Senate.”<sup>25</sup>

Timberg does not purport to have all of the answers. His work, however, forces the reader to recognize the ambiguous nature of “obedience” and “loyalty.”

Drawing on his in-depth character sketches, Timberg develops themes to explain the motivations behind his subjects’ actions. Ultimately, he tries to explain how three of these men became involved in the Iran-Contra scandal. First, Timberg suggests that the protagonists’ common Naval Academy and military experiences molded their character developments similarly. As discussed earlier, the author discerns traits that are common to the protagonists, such as loyalty and deference to authority. In addition, Timberg views the Vietnam War as a “filter” through which all of the protagonists, to one degree or another, interpret the world. According to the author, the Vietnam War indelibly marred these men’s intellects, souls, and psyches. Timberg believes that the experience of Vietnam goes a long way towards explaining the deeds, and more so the misdeeds, of the protagonists long after the war ended. Timberg “became convinced that Vietnam and its aftermath lay at the heart of the [Iran-Contra scandal], that absent Vietnam there would have been no Iran-Contra.”<sup>26</sup> Timberg’s analysis was fascinating, but his theories were not convincing. In particular, his analysis was over-simplified and perhaps overly kind to the three Iran-Contra offenders, North, Poindexter, and McFarlane.

Timberg invoked the Vietnam War for so many policy propositions that there was no clear unifying theme. He mentioned the most well-known Vietnam syndrome, “a deeply ingrained wariness of deploying American troops without a national consensus,”<sup>27</sup> but Timberg also believed that “North’s zeal to supply the Nicaraguan Contras . . . had its roots in Vietnam.”<sup>28</sup> Further, in 1983, McFarlane, as the U.S. Middle East envoy, “like Oliver North and Jim Webb shipping out after the Tet Offensive of 1968, . . . readied himself to march off in pursuit of another lost, if

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25. *Id.* at 473.

26. *Id.* at 18-19.

27. *Id.* at 343.

28. *Id.* at 149.

arguably noble cause.”<sup>29</sup> Timberg never cogently explains how the Contra scenario or the Middle East scenario resemble the Vietnam War experience.

Timberg admits that veterans “reacted in different ways” emotionally to the war.<sup>30</sup> Some became “ticking time bombs;” others, “derelicts, street people, drains on society;” still others “turned against the war,” but the protagonists, Timberg asserts, “went to ground . . . waiting patiently for America to ‘come to its senses.’ No less angry, bitter, and confused, these men were, above all, survivors.”<sup>31</sup> This is true, but Timberg erred when he imposed a common reaction on the five men’s lives. Each man reacted to Vietnam, but in his own way. The five followed different paths.

Just as each of the protagonists reacted to the war differently, each man *experienced* Vietnam differently. Only Webb and North had similar experiences as Marine infantry platoon leaders, and their similar experiences yielded vastly different results. Yet, Timberg paints Webb as the most independent thinker of the five and the most defiant of authority. North, on the other hand, is not a thinker, but rather an obedient, though resourceful, automaton. McFarlane served as a Marine artillery officer. McCain was a Navy pilot and a six-year prisoner of war. Poindexter served at sea during the war, but did not experience combat. He admitted that “Vietnam ‘didn’t have much impact on [me] . . . [I] viewed it as ‘just another mission to be performed.’”<sup>32</sup> Since the five men lack a common “Vietnam experience,” Timberg’s theory falters.

Timberg, the reporter, disproved the theses of Timberg, the theorist. The diversity of the protagonists’ characters and life choices belies Timberg’s theories. Timberg showed the reader that the subjects entered the Naval Academy with different backgrounds, ideas, and ideals. They departed the Academy with common experiences, but not with common values and ideals. From the start, at the Academy, Poindexter and McFarlane believed in “the system.” McCain and Webb rebelled. North was unpredictable. The United States Naval Academy and the military may

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29. *Id.* at 319.

30. *Id.* at 86.

31. *Id.*

32. *Id.* at 163.



have reinforced a sense of deference, but military training did not embed it in these men, nor does the military desire unquestioned authority.

Undoubtedly, an event as traumatic as the Vietnam War will impact on the psyche of a human being. The question, however, is *how* will the event affect the individual? McCain drew strength. Webb gained confidence. Would McCain or Webb have succumbed to abandoning their principles? No. Timberg's desire to attribute actions and motivations to outside sources (the Academy, the military, the war) is insulting to the institutions that he indirectly "blames." Further, Timberg's reasoning belittles each human being's free will and personal responsibility.

*The Nightingale's Song* is a powerful work that chronicles the lives of five American patriots. Timberg's reporting invites the reader to delve into the lives of men who have greatly influenced the American military and American society over the last thirty years. The book is a must read for anyone who is interested in leadership, contemporary U.S. history, or politics. While not everyone will agree with Timberg's underlying theories, no one will be disappointed with his work.

## WE WERE SOLDIERS ONCE... AND YOUNG'

REVIEWED BY MAJOR MICHELE B. SHIELDS<sup>2</sup>

In February 1963, the United States Army created the 11th Air Assault Division (Test) at Fort Benning, Georgia to assess a new concept of warfare—airmobility. The intent was to produce faster paced combat by bringing the infantry into battle via helicopter. Lieutenant Colonel Harold G. Moore, Jr., took command of one of the battalions of the 11th Air Assault Division in June 1964. He trained and tested the officers and soldiers of his battalion for over a year. Upon completion of testing, the 11th Air Assault Division (Test) was redesignated the 1st Cavalry Division (Airmobile), and Lieutenant Colonel Moore's battalion was given the 1st Battalion, 7th Cavalry colors. The sister battalion became the 2d Battalion, 7th Cavalry. In August 1965, the 1st Cavalry Division, including the 1st and 2d Battalions, 7th Cavalry, deployed to Vietnam.

*We Were Soldiers Once... and Young* is about these two battalions and their respective battles at Landing Zones X-Ray and Albany in the Ia Drang Valley. In the prologue, the authors state the purpose of the book: "[T]his story is about the smaller, more tightly focused 'we' . . . the first American combat troops, who . . . fought the first major battle of a conflict that would drag on for ten long years . . ."<sup>3</sup> The authors never stray from that purpose. In just four days, over two hundred Americans and thousands of North Vietnamese died in combat. The memories of those who fought and died in the Ia Drang Valley are brought to life throughout *We Were Soldiers Once . . . and Young*.

The authors reproduce the intensity of combat at its highest. They stress the importance of organization and communication in battle. They prove that tough training and discipline save lives in battle. Because these concepts can be applied to many aspects of day to day life, any leader, mil-

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1. LIEUTENANT GENERAL HAROLD G. MOORE (RET.) AND JOSEPH L. GALLOWAY, *WE WERE SOLDIERS ONCE . . . AND YOUNG* (First Harper Perennial ed., 1993)(1992).

2. Judge Advocate General's Corps, United States Army. Written while assigned as a student in the 46th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

3. MOORE AND GALLOWAY, *supra* note 1, at xvii.

itary or civilian, can learn from this book. *We Were Soldiers Once. . . and Young* is a must read for all.

Both authors, Joseph L. "Joe" Galloway and Lieutenant General (Retired) Harold G. "Hal" Moore, are distinguished in their respective fields. Joe Galloway was a war correspondent for United Press International (UPI) in 1965-1966. He was attached to the 1st Battalion, 7th Cavalry and was present at Landing Zone X-Ray. He spent three additional tours in Vietnam and fifteen years overseas as a writer for UPI. Hal Moore graduated from the United States Military Academy in 1945. He commanded the 1st Battalion, 7th Cavalry at Landing Zone X-Ray in the Ia Drang Valley. During his career, he was the commander, 3rd Brigade, 1st Cavalry Division, Vietnam; commander, 7th Infantry Division, Korea; commander, Fort Ord, California; and Army deputy chief of staff for personnel. He retired from the U.S. Army as a three-star general in 1977 after thirty-two years of service. The vast experiences of both authors contribute to this well-written and informative book. Most importantly, the authors' presence at Landing Zone X-Ray allowed them to express the sights, sounds, and feelings of combat from a personal perspective. The reader can truly appreciate the openness and candor of these respected men as they describe their own and others' emotions throughout the book.

The authors conducted extensive research over several years to document their book. At the first Ia Drang Reunion in 1988, they received a large amount of material from surviving American soldiers. This material included photos, letters, Army orders, newspaper and magazine clippings, and more. The authors also received valuable information through questionnaire responses and personal and telephonic interviews. Some soldiers offered their personal notes, diaries, and maps for their perusal. Additionally, the authors inspected military records, including studies, after-action reports, and maps. They also met with several North Vietnamese commanders to discuss the battles of the Ia Drang. One North Vietnamese commander brought his personal diary and battle map to the interview. The authors returned to Vietnam and revisited the battlefield. They document their sources in detail throughout the book, and the extensiveness of their research is readily apparent by the number, diversity, and cross-referencing of sources. Galloway and Moore should be applauded for the time, energy, and attention to detail that they devoted to researching and writing this book.

The authors' efforts to substantiate events with facts from more than one source reveal their determination to provide an accurate account of

each battle. The reader can easily deduce, however, that some surviving soldiers may not have cooperated with the authors in their search for the facts. For example, one prominent individual, Lieutenant Colonel Robert McDade, commander of the 2d Battalion, 7th Cavalry at Landing Zone Albany, was seldom quoted. Other surviving soldiers were briefly mentioned without quotes. Despite these barriers, the authors' conclusions are generally logical. Yet, their lack of impartiality is apparent at times. The authors were present at Landing Zone X-Ray. They were not present at Landing Zone Albany. The book indicates their bias in favor of the leadership and management style used by Lieutenant Colonel Moore at Landing Zone X-Ray.

The authors include numerous maps and photographs to assist the reader. The maps, which are located in the front of the book, depict key terrain features and the locations of friendly and enemy forces. They include maps of Landing Zones X-Ray and Albany at different times during each battle. They are simple but useful. Although a military officer or soldier may prefer more detail, the maps are a valuable resource to any reader, because they help the reader to see and to understand the changes as the battle unfolds. Numerous photographs are also included in the middle of the book. Some photographs are U.S. Army official photographs; others are personal photos; and most of them are posed. The photographs tell a story of their own and help the reader to visualize many aspects of the war. They show the youth of the soldiers, the families of these soldiers, and the camaraderie between soldiers. The photographs portray many things that words cannot describe.

Although the authors do not include many photographs of combat, they easily paint the bloodshed. The descriptive words, formatted in a novel-like package, reveal the true suffering, sacrifice, and heroism of battle. Their portrayal of piled up bodies makes the reader envision them. Their recounting of the filth on those soldiers who camouflaged themselves with the ground makes the reader see those dirty, enemy soldiers. The authors depict each minute and each hour of those long days and nights at Landing Zones X-Ray and Albany. Galloway and Moore keep the reader continually mesmerized.

The biggest hurdle while reading this book is keeping track of all soldiers mentioned—their names, their platoons, and their companies. There were approximately 450 soldiers in each battalion. Fortunately, the authors do not attempt to account for each one, but they do mention quite a few. The authors attempt to assist the reader in tackling this obstacle by

describing a few of the key players up front. However, it is hard to remember each soldier due to the large number mentioned and the fast-paced action of combat. The reader may have to flip back and forth to the maps, photographs, and other pages to comprehend fully each soldier and his position in the battle. In addition, the reader may refer to the appendix, where the authors give brief histories of numerous soldiers, including their platoons and companies and their most recent locations and professions. The distraction of flipping pages is minimized by the compelling urge to keep reading and to see what happens next.

A reader with limited military knowledge should not shy away from this book. The authors explain simple and intricate military maneuvers in terms that lay people can understand. They consistently place asterisks by uncommon military terms and provide brief, meaningful explanations. This information is beneficial to any reader and is not distracting in any way. Few asterisks are required, and the book continually flows in novel-like form.

Galloway and Moore divide their book into four sections: "Going to War," "X-Ray," "Albany," and "Aftermath." The organization is simple but deliberate and meaningful. Each section is divided into appropriately titled chapters. The authors begin each chapter with a quote from a notable leader or writer. Each chapter title and quotation is well thought out and gives the reader a better understanding of what occurs in that chapter.

The first section, "Going to War," describes the development and training of the 11th Air Assault Division (Test). In this section, Hal Moore takes command of his battalion at Fort Benning. Upon assumption of command Lieutenant Colonel Moore tells his troops, "I will do my best. I expect the same of you."<sup>4</sup> He and his battalion spend most of their time in the field, training in the new techniques of helicopter warfare. Moore emphasizes tough military training, tough discipline, and tough physical training while preparing his battalion for combat. He also stresses to all of his soldiers the importance of leadership in combat. He trains each subordinate to be prepared to take charge if his superior is killed in combat.

Moore was fortunate to serve as the battalion commander for fourteen months before his unit was deployed to Vietnam. However, many of the battalion's soldiers did not deploy to Vietnam because their active duty tours were not extended by executive order. At deployment, the battalion

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4. *Id.* at 20.

was understrength by about 100 soldiers. At this point, Moore had to adhere to the philosophies he preached to his subordinates — flexibility in training and attitude. Lieutenant Colonel Moore's standards, goals, and philosophies were right on target, and, at Landing Zone X-Ray, his battalion benefited from his tough training.

The second section, "X-Ray," describes the 1st Battalion, 7th Cavalry's battle at Landing Zone X-Ray. On 14 November 1965, helicopters dropped the 1st Battalion, 7th Cavalry at Landing Zone X-Ray. Their mission was to find the enemy. As soon as the American soldiers hit the ground, they spotted the enemy. The North Vietnamese soldiers immediately surrounded the battalion. The battle of the Ia Drang Valley began when the American soldiers landed, and it continued for three days.

This section describes the details and swiftness of combat as the battle at X-Ray unfolds. The descriptions include horror, death, and destruction. The authors also describe the bonds that developed between the soldiers in those hours of intense combat.

The authors emphasize the leadership characteristics of the battalion commander, Lieutenant Colonel Moore. They depict Moore as a courageous and selfless leader. One aviator is quoted as saying: "[A]s we broke over the trees into the clearing I could see Hal Moore standing up at the far end of the LZ [landing zone], exposing himself to enemy fire in order to get us into the safest position possible in the LZ." Additionally, the authors highlight Moore's leadership style. He maintained a "take charge" attitude and led by example. Moore's philosophy was that the commander should always be the first person into, and the last one out of, a combat area. Moore arrived at Landing Zone X-Ray on the first helicopter and instantly set up his command post. At one point in the battle, Moore had to make a conscious effort to resist his instincts to become another soldier on the perimeter. He knew he had to maintain command and control to keep his battalion alive. Moore maintained command and control until the battle was over. He was the last soldier to depart Landing Zone X-Ray.

Hal Moore was also a compassionate leader. After the battle at X-Ray, he took the time to shake his soldiers' hands and to thank them. He also spent numerous hours drafting letters to the families of soldiers who had been killed in action. When Lieutenant Colonel Hal Moore turned over command of the 1st Battalion, 7th Cavalry on Tuesday, 23 November 1965, he stood with his soldiers in formation, spoke to them, and cried. His care and concern made an impact on many soldiers. Almost twenty years

later, Sergeant First Class Clarence W. Blount wrote, "I remember you [Moore] . . . gave our entire unit a fine speech for the great artillery support . . . . That speech made a lasting impression on me. I felt that my usefulness to my country, the Army, and my unit was really at its peak at that time."<sup>5</sup>

Nevertheless, the authors do not discount the mistakes made by the commanders and soldiers of the 1st Battalion, 7th Cavalry. Over 100 American soldiers died at X-Ray. Galloway and Moore never let the reader forget the effect that those deaths had on them and on the other survivors.

Lieutenant Colonel Moore was instrumental in the success of his battalion at Landing Zone X-Ray. Yet, the authors do not believe that this battle was a "win" for the U.S. Army. In fact, the authors interviewed several North Vietnamese leaders who claimed a win. In the authors' opinion, the Americans could consider X-Ray a "draw," at most.

The organization and communication of the 1st Battalion, 7th Cavalry were significant factors in the survival of its soldiers at Landing Zone X-Ray. Additionally, Moore credits "luck, rapid reaction to orders, and trained and disciplined soldiers"<sup>6</sup> for the battalion's success. Moore was fortunate; he had the opportunity to train and to lead his soldiers for over one year before they entered the Ia Drang Valley. Lieutenant Colonel McDade, the battalion commander at Landing Zone Albany, was not blessed with the same opportunity and luck.

The third section, "Albany," describes the 2d Battalion, 7th Cavalry's battle at Landing Zone Albany. On 17 November 1965, the battalion marched from Landing Zone X-Ray to Landing Zone Albany. Its mission was to move to Albany and to establish a landing zone. North Vietnamese soldiers ambushed the American soldiers when they arrived. Once more, the authors detail each event of the battle, and the story of valor, confusion, and horror on the battlefield continues.

The 2d Battalion, 7th Cavalry was not as cohesive a unit as the 1st Battalion, 7th Cavalry was. Immediately prior to its deployment to Vietnam, the battalion was formed from units that were scattered throughout

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5. *Id.* at 239.

6. *Id.* at 84.

the United States. Lieutenant Colonel McDade took command of the battalion only a few weeks before the battle at Albany.

The battalion's mission appeared to be simple. The intelligence section did not report enemy in the area. The leaders and soldiers of the 2d Battalion, 7th Cavalry were under the impression that they were going on a walk through the jungle.

While the troops were dispersed during the march, Lieutenant Colonel McDade called a meeting of his commanders. All of the commanders and their radio operators were gathered together when the North Vietnamese attacked. The result was chaos. Lieutenant Colonel McDade lost organization, control, and communication. Like the battle at X-Ray, over 100 Americans were killed.

The authors do not attempt to compare these two battles. They point out the differences in the battalion commanders and their leadership styles. Like Moore, Lieutenant Colonel Robert McDade was a combat veteran. He commanded a rifle platoon in World War II and a rifle company in the Korean War. He was awarded two Silver Stars and three Purple Hearts. Unlike Moore, McDade had not received training in airmobile techniques.

The authors portray Lieutenant Colonel McDade as a passive leader. One of the soldiers in the 2d Battalion, 7th Cavalry described McDade as "laid back." An officer said, "McDade took over, and . . . he quietly observed, giving what I would call sotto voce orders."<sup>8</sup> In reality, however, Lieutenant Colonel McDade may not have had the chance for his leadership style to emerge. He took command of his battalion just a few weeks before the battle at Albany. Many officers stand back and silently observe their organizations for a few weeks or months before they initiate changes.

The authors pinpoint McDade's meeting with his commanders as his biggest mistake. This criticism is easily deduced. When the North Vietnamese attacked, McDade lost communication and control. His commanders and a few others were centralized in one perimeter, and the remainder of the battalion was scattered throughout the jungle. This mistake could have been avoided. Lieutenant Colonel McDade should have realized that the enemy was nearby when his soldiers captured two North Vietnamese prisoners. He should have exercised caution and developed

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7. *Id.* at 247.

8. *Id.* at 246.



another plan to communicate with his commanders. McDade's mistake cost lives.

Galloway and Moore point out many other mistakes that were made. For example, the intelligence section reported no enemy in the area; the mission lacked a clear objective; and the mission did not include airmobile techniques. These mistakes were made at levels much higher than the battalion commander. These mistakes also cost lives in the battle at Landing Zone Albany. Those same higher level mistakes cost American lives in the battle at X-Ray and other battles in Vietnam.

The authors do not focus on criticism. They commend other leaders at Albany. For instance, Captain Forrest, the Alpha Company commander, left McDade's meeting before he was dismissed. He ran over 600 yards with bullets zipping by him so that he could organize and control his company. He immediately formed his company in a defensive perimeter. Forrest's courageous act saved many lives. He is a truly selfless leader who placed the lives of his soldiers above his own.

The last section, "Aftermath," summarizes the two theses of the book. First, the authors discuss the effects of the Ia Drang battles on the Vietnam War. In these battles, the 1st Cavalry Division implemented new tactics and techniques. Afterwards, military commanders looked at the statistics—a kill ratio of twelve North Vietnamese to one American—and claimed victory. Commanders deduced that they could "bleed the enemy to death."<sup>9</sup> As a result, the United States committed additional men, money, and material to Vietnam, despite the uncertainty of success and the probability of a lengthy war. Airmobile warfare was validated. However, the North Vietnamese remained tenacious. The battles in the Ia Drang Valley were the first of many. The Vietnam War lasted ten years, cost 58,000 American lives, and ended in an embarrassing loss. The authors do not analyze the how and why of the Vietnam War, but at least one critic wanted more details. "[A]lmost every important question the reader might have about the deeper issues of this battle go[es] unanswered and unasked."<sup>10</sup>

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9. *Id.* at 399.

10. William Broyles Jr., *Remember the 60s? The War We Were Soldiers Once . . . and Young*, L.A. TIMES, Dec. 13, 1992.

Certain issues, however, are clearly beyond the scope of the book, and the authors properly excluded them.

The authors' second and most meaningful message is a dedication to the brave soldiers, American and Vietnamese, who fought at the Ia Drang Valley. This message recurs throughout the book. "Aftermath" emphasizes this thesis by including emotional stories from surviving soldiers and family members of deceased soldiers. Many lives were touched by the deaths of the American soldiers from the 1st Battalion, 7th Cavalry and the 2d Battalion, 7th Cavalry. The emotions one feels while reading *We Were Soldiers Once . . . and Young* are best expressed by Specialist Four Ray Tanner, Alpha Company, 1st Battalion, 7th Cavalry. Specialist Tanner said, "As I reflect on those three days in November, I remember many heroes but no cowards. I learned what value life really had. We all lost friends but the bravery they showed on the battlefield will live forever.""

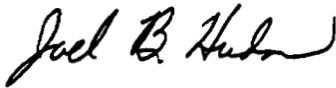
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11. MOORE AND GALLOWAY, *supra* note 1, at 375.

By Order of the Secretary of the Army:

**DENNIS J. REIMER**  
*General, United States Army*  
*Chief of Staff*

Official:

A handwritten signature in black ink, reading "Joel B. Hudson". The signature is fluid and cursive, with the first letters of each name being capitalized and prominent.

**JOEL B. HUDSON**  
*Administrative Assistant to the*  
*Secretary of the Army*  
**05182**

